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Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~109~~ 7

J. D. CONLEY, STANLEY MOORE, SR., GEORGE L. CARTER AND B. A. WATSON, PETITIONERS,

vs.

PAT. J. GIBSON, GENERAL CHAIRMAN OF LOCALS 6051 AND 28, RAYMOND DICKERSON, DIVISION CHAIRMAN OF LOCALS 6051 AND 28, BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, A. F. OF L., ET AL.

PETITION FOR CERTIORARI FILED MAY 24, 1956

CERTIORARI GRANTED OCTOBER 8, 1956

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DESIGNATION OF RECORD ON APPEAL

(Filed, March 23, 1955)

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

J. D. CONLEY, STANLEY MOORE, SR., GEORGE I. CARTER and B. A. WATSON,
Plaintiffs,

versus

PAT J. GIBSON, GENERAL CHAIRMAN OF LOCALS 6051 and 28, RAYMOND DICKERSON, DIVISION CHAIRMAN OF LOCALS 6051 and 28, BROTHERHOOD OF RAILWAYS AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, A. F. of L. AND LOCAL 28 of the BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES,
Defendants.

CIVIL ACTION FILE No. 8443

Pursuant to Rule 75 (a) of the Federal Rules of Civil Procedure, the Plaintiffs-appellants hereby designate for inclusion in the record on appeal to the United States Court of Appeals for the Fifth Circuit, taken by notice of appeal filed March 23, 1955, the following portions of the record, proceedings, and evidence in this action:

1. The complaint.

2. The answer and motion to dismiss of the defendants.

3. The Judgment.

4. Notice of Appeal.

5. This designation.

DENT, FORD, KING & WICKLIFF,
By (s) ROBERSON L. KING,
(Roberson L. King),
Attorneys for Appellants J. D. Conley, Stanley Moore, Sr., George L. Carter and B. A. Watson.

Address: 618 Prairie Avenue,
Houston, Texas.

CAPTION

In the United States District Court for the Southern District of Texas, Holding Sessions at Houston.

J. D. Conley, Stanley Moore, Sr., George L. Carter and B. A. Watson,
vs. No. 8443 Civil Action.
Pat J. Gibson, General Chairman of Locals 6051 and 28, et al.

Be It Remembered: That in the above entitled and numbered cause, lately pending in said Court, in which Order of Dismissal was rendered at the Regular February 1955 Term of said Court, to-wit: On the 21st day of

March A. D. 1955, the Honorable T. M. Kennerly, Judge, of the United States District Court for the Southern District of Texas, presiding the following proceedings were had, to-wit:

COMPLAINT

(Filed, Aug. 21, 1954)

(Title Omitted)

I.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1331, this being a suit in equity under the Constitution and laws of the United States, viz., the Fifth Amendment of the said Constitution and—45 United States Code, Section 151 et seq. more commonly known as the National Railway Labor Act, wherein the matters in controversy exceeds the sum or value of three thousand dollars ($3,000.00) exclusive of interests and costs. The right here sought to be redressed are: (1) the right to be represented by the exclusive collective bargaining representative of the class without discrimination because of race or color which is required as a duty by the National Railway Labor Act of all bargaining representatives who are the exclusive representatives of a class or craft of employees; (2) the right not to be discriminated against by the action of the Union in allowing certain jobs to be abolished, where such jobs are not in fact abolished but certain plaintiffs and those whom they represent have lost their previously accrued seniority; (3) the right to retain seni-

ority consistent with other employees who are members of the union, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, of the Clerks Class or Craft, who are members of the white race, whose jobs have not been abolished and who have not because of any pretended abolition of jobs lost their seniority status; (4) the right not to be discriminated against because of race or color in the exercise of seniority rights as secured by the National Railway Labor Act 45 U. S. C. A. Section 151 et seq. and the 5th Amendment to the United States Constitution; (5) the right to receive non discriminatory treatment by the Union under union security provisions of the Union Shop Agreement between the Union and the carrier, Texas and New Orleans Railroad Company, employer of plaintiffs, which last mentioned agreement became effective the 1st day of March 1953, which said agreement further requires plaintiffs to maintain membership in the Union under penalty of discharge; (6) the right to have all legitimate grievances considered by the union and the right to be treated by said union with the utmost candor, fairness, and straight forwardness.

II.

This is a complaint and a proceeding for a permanent injunction enjoining the defendants and each of them, their agents, servants, representatives, officers and members from refusing to afford to plaintiffs representation on the collective bargaining level, equal to that afforded to other employees within the class or craft who are persons of the white race; and from refusing to protect plaintiffs, and those whom they represent, from discrimination resulting from curtailment of their seniority rights; and further enjoining defendants and each of them, their agents,

servants, representatives, officers and members from refusing or failing to protect plaintiffs and those whom they represent from discriminations resulting from discharge from employment by reason of any pretended abolition of jobs, when persons of the white race in the same craft have not, under identical circumstances, been discharged.

III.

This is a proceeding for a declaratory judgment pursuant to Title 28, United States Code, Section 2201, for the purpose of determining questions in actual controversy between the parties, to-wit:

(a) Whether defendants or any of them, their agents, servants, representatives, officers or members may refuse to discharge the obligation imposed upon said union by the National Railway Labor Act;

(b) Whether defendant or any of them, their agents, servants, representatives, officers or members owe a duty to plaintiffs and those whom they represent, under the National Railway Labor Act and the 5th Amendment to the U. S. Constitution, of protection from discriminatory discharge and curtailment of seniority standing, and from in anywise permitting any kind of job insecurity practices to be practiced toward plaintiffs and those whom they represent in this action;

(c) Whether defendants or any of them, their agents, servants, representatives, officers or members, national or local can lawfully, under the terms of the Union Shop Contract of March 1, 1952, which provides for compulsory union membership be compelled to accept membership in said union on terms different from that which is applic-

able to persons or employees of the white race of the same class; whether plaintiffs, under the Union Shop Agreement, aforesaid, may lawfully under the Constitution and laws of the United States be segregated into a local union of the craft in which they are cut off from and denied effective representation on a par equal to that afforded to white employees who are members of the same craft or class;

(d) Whether defendants and each of them under the Constitution and the National Railway Labor Act can refuse to afford to plaintiffs and those whom they represent in this action representation equal to that afforded members of the white race, employees of the Texas and New Orleans Railroad Company, at its Freight House in Houston, Harris County, Texas, inasmuch as all of said employees belong to the craft or class of Steamship Clerks, Freight Handlers and Section Employees, and all amployees are members of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees;

(e) Whether the defendants and each of them may refuse because of race or color to bargain collectively on behalf of plaintiffs in an effect to assure to them continued employment and continued accrual of seniority privileges in the face of the alleged and purported lease agreement between the T & NO Railroad Company, Southern Pacific Line in Texas, in such manner as they have done for the Clerks of the class or craft aforesaid;

(f) Whether there is a valid and subsisting lease agreement between the Texas and New Orleans Railroad Company and the Southern Pacific Transport Company with regard to the leasing of a portion of the docks owned

by the T & NO Railroad Company to the Southern Pacific Transport Company and what the terms of said agreement contain;

(g) Whether some of the persons whom plaintiffs represent may, upon rehiring be required to place their union membership with the International Brotherhood of Teamsters, Local 968 since they are doing Freight Handler's work.

IV.

This is a class action pursuant to Rule 23 (a) of the Federal Rules of Civil Procedure brought by the individual plaintiffs on behalf of themselves and other persons similarly situated, i.e., Negro citizens of the United States and of the State of Texas, interested in this suit, members of the craft or class of Steamship Clerks, Freight Handlers, Express and Station Employees, and members of Local 6051 of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, who seek admission into Local 28 and the abolition of Local 6051 under 45 U. S. C. A. Sec. 152 (a) and who have been denied adequate representation by their collective bargaining agent. The said persons constitute a class too numerous to be brought individually before the Court, but there are common questions of law and fact involved herein, common grievances arising out of common wrong, and common relief for the plaintiffs. The interests of the said class are fairly and adequately represented by the plaintiffs. This is a class action pursuant to Rule of Civil Procedure agent the individual defendant Raymond Dickerson, and as representing all other persons similarly situated who are members of Local 28, of the Brotherhood of Railway Steamship Clerks,

Freight Handlers, Express and Station Employees; this is a class action pursuant to Rule 23 (a) of the Federal Rules of Civil Procedure against the individual defendant Pat J. Gibson, and as representing all other persons similarly situated who are members, officers, agents or representatives of the international organization of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, A. F. of L. The interests of the class are fairly adequately represented by the plaintiffs.

V.

The named individual plaintiffs and all of whom they represent are employees of the Texas and New Orleans Railroad Company and/or the Southern Pacific Transport Company, both corporations doing business in Houston, Harris County, Texas, and they are members of the Negro Race and members of Local 6051 of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

VI.

The defendant Local 28 is a Labor union, subordinate organization of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and its membership is constituted and composed solely of persons of the white race. The defendant Local 28 is a component element of the exclusive bargaining agent of the employees of the Clerks; Freight Handlers Craft employees at the T & NO Freight House and is in fact the sole exclusive bargaining agent of the employees thereof. The defendant Local 28 has been designated exclusive bargaining agent pursuant to the terms of the

National Railway Labor Act 45 U. S. C. A. 151 et seq. The named individual defendant, Pat J. Gibson is District Chairman of Locals 6051 and 28 of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

VII.

The T & NO Railroad Company and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees entered into a union shop Contract, which contract by its terms is made a part of these pleadings as if recited herein, which became effective on the 1st day of March, 1953, providing in Sec. 1 thereof as follows, to-wit:

" . . . . all employees of the carrier now or hereafter subject to the rules and working conditions agreement between the parties hereto, shall, as a condition of their continued employment . . . . become members of the organization party to this agreement representing their craft or class. . . ."

The said Brotherhood for various purposes of collective bargaining maintains two separate locals composed of employees who work at the Houston Freight House of the Texas and New Orleans Railroad Company. The aforesaid Local 6051 is constituted and composed solely of members of the Negro race and the aforesaid Local 28 is constituted and composed solely of members of the White race. That plaintiffs and those whom they represent have been compelled to join Local 6051 solely because they are members of the Negro race and solely for the purpose of affording to plaintiffs a representation inferior and different to that offered to members of the

white race of the craft who are admitted to membership in Local 28. The Union Shop Agreement aforesaid further provides in Section 4 as follows, to-wit:

"Nothing in this agreement shall require an employee to become or to remain a member of the organization in such membership is not available to such employment upon the same terms and conditions as are generally applicable to any other member . . ."

It is also provided in the National Railway Labor Act, 45 U. S. C. A. Section 152 (a), as follows, to-wit:

the union and the carrier shall be permitted "(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective dates of such agreements, which ever is the later, all employees shall become members of the labor organization representing their craft or class. Provided, that no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other members . . ."

Notwithstanding the above contract and statutory provision plaintiffs and all of those whom they represent, exclusive of those who have been compelled to join the International Brotherhood of Teamsters, Local 968, have been compelled to accept membership in Local 6051 which is a condition of membership not generally applicable to other members, and have segregated into Local 6051, an inferior unit, solely on the basis of race alone, which act of segregation constitutes a discriminatory denial to said plaintiffs of due process of law guaranteed by the 5th

Amendment to the Constitution of the United States of America.

VIII.

Prior to on or about the 1st day of May 1954, plaintiffs and all persons whom they represent by this action were employed by the Texas and New Orleans Railroad Co. as freight handlers (Stevedores) at the Houston Freight House of the said T & NO Railroad Company. Prior to said aforementioned date the exclusive bargaining agent representing plaintiffs, and others interested in this action as plaintiffs was the defendant Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees. As such bargaining agent the Brotherhood had entered into a collective bargaining agreement with the T & NO Railroad Co. effective November 1st, 1939 under which agreement plaintiffs have worked since such effective date, and which agreement is made a part of these pleadings as if recited therein. On or about the 1st day of May 1954 there was passed on the bulletin board at the Houston Freight House of the T & NO Railroad Company, in a conspicuous place, a notice stating that a certain number of jobs were being abolished, approximately forty-five, of which abolition of jobs plaintiffs and those whom they represent had no notice as required under collective bargaining agreement between the T & NO Railroad Company and the Brotherhood aforesaid. That said union defendants, nor any of them, did not attempt to notify plaintiffs or appraise them of the condition under which these discharges had occurred, but suffered them to transpire without in any manner coming to the aid of plaintiffs and those whom they represent; and did decline to hear plaintiffs on this question of discharging repeatedly and without reason. Defend-

ants did state on some occasion that the said abolition of jobs and discharging was due to the leasing of certain portions of the docks at the Houston Freight House by the T & NO Railroad Company to the Southern Pacific Transport Company and that there was nothing that could be done. Plaintiffs state on information and belief that no other jobs were abolished except those held by Negroes.

IX.

Plaintiff further allege, on information and belief that the said Southern Pacific Transport Company is but an extension of the T & NO Railroad Company, a subsidiary of said T & NO, owned, controlled by it to carry on the business of T & NO as the agent of said T & NO and that the two are in truth but one corporation.

X.

Plaintiffs further allege that in fact the aforementioned jobs, which were all freight handlers jobs, were not abolished, for persons were immediately hired to perform said jobs, doing the same type and class of work that plaintiffs and those whom they represent had done prior to their discharge. That many persons of the white race were hired on these jobs and subsequently some of those who had been previously fired, who are Negroes and who are interested as plaintiffs in this action were rehired, with no seniority, and junior to all the white persons who had been previously hired but who had never before performed this work. That some of the other plaintiffs and those who they represent have been displaced from their permanent jobs and placed in Break Out, none of the white employees represented by the Brotherhood have

been so discharged or displaced from permanent jobs. Plaintiffs further allege on information and belief that none of the employees, members of the white race, classified as clerks have been displaced from their permanent jobs, had their jobs abolished nor compelled to join the International Brotherhood of Teamsters Local 968, though a portion of the Freight House where such clerks perform their duties was the subject matter of the purported lease between the T & NO Railroad Company and the Southern Pacific Transport Company.

XI.

Plaintiffs and those whom they represent further allege that said acts constituted a planned course of conduct designed to discriminate against them because of their race or color. That by reason of the said acts their threatened continuation and the refusal of defendant or any of them to give to plaintiffs protection or any protection from said discrimination equal to that afforded to members of the white race of the craft represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, defendants and each of them have breached the statutory duty imposed by 45 U. S. C. A. 151 (a) [Fourth] which duty is to protect plaintiffs from any discrimination on the basis of race or color. Plaintiffs have further been deprived of their rights and property without due process of law as condemned by the Fifth Amendment of the United States Constitution. In consequence of said breach of duty on the part of defendants and lack of them, the denial of plaintiffs, constitutional rights, in refusing to protect plaintiffs and those whom they represent against the aforementioned course of discrimination on account of

race and color, plaintiffs have been damaged in the amount of Seventy Five Thousand Dollars ($75,000.00).

XII.

Each of the defendants is under a duty to discharge his duties in conformity with the Constitution, laws and public policy of the United States.

XIII.

The plaintiffs and each of them are suffering irreparable injury for which there is no adequate remedy at law by the acts of defendants here complained of and will continue to suffer such injury unless a permanent injunction is granted by this Court.

Wherefore, Plaintiffs respectfully pray this Court that upon filing of this complaint, as may appear proper and convenient to the Court, the Court advance this cause on the docket and order a speedy hearing of this action according to law and that this Court upon said hearing:

1. Adjudge, decree and declare the rights and other legal relations of the parties to the subject matter here in controversy in order that the said declaration shall have the force and effect of a final judgment.

2. That this court discover the manner in which any purported lease between the T & NO Railroad Company and the Southern Pacific Transport Company affects the rights of plaintiffs herein and those whom they represent; a discovery of the manner in which the Collective Bargaining Agreement of November 1, 1939 between the T & NO Railroad Company and the Brotherhood of Rail-

way and Steamship Clerks, Freight Handlers, Express and Station Employees has been applied.

3. Enter a final judgment and decree (a) declaring that the segregation of Negro employees of the craft represented by the Brotherhood into a separate local is illegal under the National Relations Act, and is contrary to the Union Shop Agreement of March 1, 1953, and permanently and perpetually enjoin the Brotherhood, its agents, officers, representatives or any of them from requiring plaintiffs to maintain membership in the Union by joining Local 6051 the segregated local (b) that the defendants, and each of them, their servants, agents, members and officers are permanently and perpetually restrained and enjoined from refusing to bargain for plaintiffs and those whom they represent on a basis equal to that afforded to white employees, clerks, who are also represented by the Brotherhood of Railway and Steamship Clerks (c) that the defendants, and each of them, their servants, agents, members and officers are permanently and perpetually restrained from refusing to protect plaintiffs and those whom they represent from discriminatory action because of race or color from whatever quarter emanating.

4. That this Court issue a permanent injunction forever restraining the defendants, and each of them, their agents, servants, officers and members from permitting, or engaging in any discrimination toward plaintiffs and those whom they represent, from allowing plaintiffs jobs to be abolished summarily, and from allowing the discharge of plaintiffs and those whom they represent, the termination of their seniority on account of race or color when employees of the white race, clerks, are not so affected; and that the defendants be restrained from being or purporting to act as exclusive collective bargaining

agent with the T & NO Railroad Company concerning grievances, labor disputes, wages, rates of pay, and hours of employment so long as any acts of discrimination continue, and unless and until the defendant Labor Union, its agents, servants, officers and members, give these plaintiffs and all of the other Negro employees whom they represent, equality of representation on any phase of labor negotiations.

5. Plaintiffs further pray that this Court award them judgment for damages in the amount of Seventy-Five Thousand Dollars ($75,000.00).

6. Plaintiffs further pray that this Court allow them their costs herein and grant such other, further or additional relief as may appear to the Court to be equitable and just.

(s) J. D. CONLEY,
(s) STANLEY MOORE, SR.
(s) GEORGE L. CARTER,
(s) B. A. WATSON,
Plaintiffs.
DENT, FORD, KING & WICKLIFF,
By (s) ROBERSON L. KING,
(Roberson L. King),
Attorneys for Plaintiffs.

618 Prairie,
Houston 2, Texas.

The State of Texas,
County of Harris.

We, J. D. Conley, Stanley Moore, Sr., George L. Carter and B. A. Watson, each being duly sworn according to law, on oath, deposes and says that we have each read the foregoing complaint by us subscribed; that we know

the matters and things therein contained, that the matters and things stated by us as true are true, and those stated upon belief and information we verily believe to be true.

(s) J. D. CONLEY,
(J. D. Conley),
(s) STANLEY MOORE, SR.,
(Stanley Moore, Sr.),
(s) GEORGE L. CARTER,
(George L. Carter),
(s) B. A. WATSON,
(B. A. Watson).

Subscribed and sworn to before me this 21st day of August, 1954.

(s) PHARNICE MARIE HARRIS,
(Pharnice Marie Harris),
Notary Public in and for
Harris County, Texas.

My Commission expires June 1, 1955.

MOTION TO DISMISS

(Filed, Nov. 5, 1954)

(Title Omitted)

The above-named defendants respectfully move the Court to dismiss this action upon the following grounds:

1. It appears on the face of the Complaint that this Court has no jurisdiction over the subject matter of the action for the reason that by an Act of Congress known as the Railway Labor Act (45 U.S.C. Section 151 et seq.) the National Railroad Adjustment Board is given exclusive jurisdiction of disputes involving the application or interpretation of collective bargaining agreements in the railroad industry such as the agreements upon which plaintiffs purport to base their claims.

2. It appears on the face of the Complaint that there is a defect of an indispensable party defendant. While plaintiffs seek injunctive relief and a declaratory judgment concerning alleged rights in connection with their employment with the Texas and New Orleans Railroad Company based upon agreements existing between said railroad company and the Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, they have failed to make the Texas and New Orleans Railroad Company a party defendant to this action.

3. The allegations of the Complaint concerning the Union Shop Agreement between the Texas and New Orleans Railroad and the defendant union fail to present a justifiable issue.

4. The Complaint fails to state a claim upon which relief can be granted.

Respectfully submitted,

FULBRIGHT, CROOKER, FREEMAN, BATES & JAWORSKI,

Second National Bank Building,
Houston 2, Texas.

By (s) CHESTER M. FULTON,
MULHOLLAND, ROBIE & HICKEY,

620 Tower Building,
Washington 5, D. C.

By (s) EDW. J. HICKEY, JR.,

Attorneys for Defendants.

Dated: November 5, 1954.

Service of a copy of the foregoing Motion at 2:20 p. m. o'clock P. M. on this 5 day of November, 1954, is hereby admitted.

DENT, FORD, KING AND WICKLIFFE,
By (s) ALOYSIUS M. WICKLIFF,
Attorneys for Plaintiffs.

MEMORANDUM OPINION OF COURT

(Dated March 16, 1955)

(Title Omitted)

Dent, Ford, King & Wickliff, (Roberson King), of Houston, Texas; for Plaintiffs.

Fulbright, Crooker, Freeman, Bates & Jaworski (Chester M. Fulton), of Houston, Texas; and Mulholland, Robie & Hickey, of Washington, D. C.; for Defendants.

KENNERLY, District Judge:

Plaintiffs J. D. Conley, Stanley Moore, Sr., George L. Carter and B. A. Watson allege in their complaint that they bring this suit under the National Railway Labor Act (Title 45, Section 151, U.S.C.A.).

They say they are citizens of the United States and of the State of Texas, and that they are negro employees of the Texas & New Orleans Railroad Company and/or the Southern Pacific Transport Company, corporations doing business in Houston, Harris County, Texas. That

they are members of a national labor union or organizations known as the Brotherhood of Railroad & Steamship Clerks, Freight Handlers, Express and Station Employees (for brevity called "Brotherhood"). That the Brotherhood has in Houston, Texas, a local union or subsidiary composed of white men and known as Local 28, and a similar local union or subsidiary composed of negro men known as Local 6051.

Plaintiffs sue Pat J. Gibson as General Chairman of Locals 6051 and 28, and Raymond Dickerson, Division Chairman thereof. They also sue Local 28. Whether the Brotherhood is sued is not entirely clear, but I am assuring that it is a party defendant herein.

Defendants have moved to dismiss alleging lack of jurisdiction, defect of parties defendant, that Plaintiffs do not in their complaint present a justifiable issue and that such complaint fails to state a claim upon which relief can be granted. This is a hearing under Local Rule 25 of such motion.

1. Plaintiffs allege that Local No. 28 is the bargaining agent of the members of the Brotherhood and has been so designated in pursuance of such Act. That Local 28 has negotiated with such Railroad Company, et al., a working agreement to which Plaintiffs refer in their complaint.[1]

Reference is made to Plaintiffs' complaint as a whole. While Plaintiffs' allegations are not at all clear, the nature of Plaintiffs' case and the relief sought appears to be stated in paragraph three of Plaintiffs' complaint (their

[1]A copy of such agreement does not appear to be among the papers in the case.

prayer) in which they pray that the Court enter a final decree—

(a) Declaring that the segregation of negro employees of the craft represented by the Brotherhood into a separate local is illegal under the National Labor Relations Act, and is contrary to the Union Shop Agreement of March 1, 1953, and permanently and perpetually enjoin the Brotherhood, its agents, officers, representatives or any of them from requiring plaintiffs to maintain membership in the Union by joining Local 6051, the segregated local—

(b) That the Defendants, and each of them, their servants, agents, members and officers are permanently and perpetually restrained and enjoined from refusing to bargain for plaintiffs and those whom they represent on a basis equal to that afforded to white employees, clerks, who are also represented by the Brotherhood of Railway and Steamship Clerks—

(c) That the defendants, and each of them, their servants, agents, members and officers, are permanently and perpetually restrained from refusing to protect plaintiffs and those whom they represent from discriminatory action because of race or color from whatever quarter emanating.

In paragraph four of their prayer they also pray—

That this Court issue a permanent injunction forever restraining the defendants, and each of them, their agents, servants, officers and members from permitting, or engaging in any discrimination toward plaintiffs and those

whom they represent, from allowing plaintiffs jobs to be abolished summarily, and from allowing the discharge of plaintiffs and those whom they represent, the termination of their seniority on account of race or color when employees of the white race, clerks, are not so affected; and that the defendants be restrained from being or purporting to act as exclusive collective bargaining agent with the T. & N. O. Railroad Company concerning grievances, labor disputes, wages, rates of pay, and hours of employment so long as any acts of discrimination continue, and unless and until the defendant Labor Union, its agents, servants, officers and members give those plaintiffs and all of the other negro employees whom they represent, equality of representation on any phase of labor negotiations.

In paragraph five of their prayer they also pray—

Plaintiffs further pray that this Court award them judgment for damages in the amount of Seventy-five Thousand Dollars ($75,000.00).

Citing Moore v. Illinois Central R. Co., 312 U.S. 630; Order of Railway Conductors v. Pitney, 326 U.S. 561; Slocum v. Delaware, L. & W. R. R. Co., 339 U.S. 239; Order of Railway Conductors v. Southern R. Co., 339 U.S. 255; Hattenbaugh v. Airline Pilots Assn. International, 189 F. (2d) 319; Hayas v. Union Pacific Co., 84 F/ (2d) 337, cert. den. 340 U.S. 942, 88 F. Supp. 168; Kendall v. Pennsylvania Railroad Co. (D.C. Ohio), 94 F. Supp. 875; Van Zandt v. Railway Express Agency (D.C. N.Y.) 99 F. Supp. 520; Butler v. Thompson (C.A. 8), 192 F/ (2d) 831, Defendants say in support of their Motion to Dismiss and their claim that this Court is without jurisdiction. That since Plaintiffs raise no question of the lawfulness of the

selection of Local 28 as a bargaining agent, nor of the validity of such bargaining agreement, jurisdiction is not here. That the Federal Courts are not charged with the duty of policing parties in the performance of collective bargaining agreements under such Act. They press the point that this case should be dismissed for lack of jurisdiction. I think and conclude that Defendants' position is well taken and their Motion to Dismiss should be granted.

The case of Moore v. Illinois Central Railroad Company, supra, standing alone may throw some doubt upon this conclusion, but that case does not stand alone. It has been modified and limited by the many cares cited. The present ruling is well stated by the Court of Appeals for this circuit in Hattenbaugh, et al. v. Airline Pilots Assn., supra, where it is said:

The Congress did not, by the Railway Labor Act, grant jurisdiction to the Federal Courts to afford relief for breaches of performance of collective bargaining agreements. Appropriate quasi-judicial tribunals have been established for that purpose. Slocum v. Delaware L. & W. R. Co., 339 U.S. 239, 70 S. Ct. 577, 94 L. Ed. 795. It is only when collective bargaining agreements are unlawfully entered into, or when the agreements themselves are unlawful in terms or effect, that Federal Courts may act. The question of federal jurisdiction being decisive, it is not necessary to consider the other contentions made by the parties. The dismissal of the cause for want of jurisdiction was correct.

Plaintiffs apparently stand upon Steele v. Louisville & Nashville Railroad Co., 323 U.S. 193, and Turnstall v. Brotherhood, 323 U.S. 211, but those cases are fully con-

sidered and differentiated by the Court of Appeals of the Ninth Circuit in Hayes v. Union Pacific R. Co., cited above.

Because of my conclusion that this Court is without jurisdiction, it is not necessary to discuss the other question presented.

Let an order be drawn and presented dismissing the case.

The Clerk will file this opinion.

(S) T. M. KENNERLY,
United States District Judge.

ORDER OF DISMISSAL

(Dated March 21, 1955)

Filed 22nd day of March, 1955

In the United States District Court for the Southern District of Texas, Houston Division.

J. D. Conley, Stanley Moore, Sr.; George L. Carter and B. A. Watson, Plaintiffs,

v.

Pat J. Gibson, Central Chairman of Locals 6051 and 28, Raymond Dickerson, Division Chairman of Locals 6051 and 28, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, A. F. of L. and Local 28 of the Brotherhood

of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Defendants.

Civil Action File No. 8443.

This cause came on to be heard on the motion of defendants, Pat J. Gibson, General Chairman of Locals 6051 and 28, Raymond Dickerson, Division Chairman of Locals 6051 and 28, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, A. F. of L. and Local 28 of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, to dismiss the above-entitled action, and it appearing to the Court that this Court has no jurisdiction over the subject matter of the action, it is,

Ordered, that the motion to dismiss is hereby granted, that this action be and it is hereby dismissed, and that defendants recover their costs.

Dated March 21, 1955.

(S) T. M. KENNERLY,
United States District Judge.

Approved as to Form:

DENT, FORD, KING & WICKLIFF,
By ROBERSON L. KING,
Attorneys for Plaintiffs.

FULBRIGHT, CROOKER, FREEMAN, BATES & JAWORSKI,
By CHESTER M. FULTON,
Attorneys for Defendants.

NOTICE OF APPEAL

(Filed, March 23, 1955)

In the United States District Court for the Southern District of Texas, Houston Division.

J. D. Conley, Stanley Moore, Sr.; George L. Carter and B. A. Watson, Plaintiffs,

vs.

Pat J. Gibson, Central Chairman of Locals 6051 and 28, Raymond Dickerson, Division Chairman of Locals 6051 and 28, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, A. F. of L. and Local 28 of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Defendants.

Civil Action File No. 8443.

To the said Honorable Court:

Notice is hereby given that J. D. Conley, Stanley Moore, Sr., George L. Carter and B. A. Watson, Plaintiffs above named hereby appeal to the United States Court of Appeals for the Fifth Circuit from the order and judgment sustaining the above named Defendants' motion to dismiss said cause for want of jurisdiction entered on the 21st day of March, 1955.

DENT, FORD, KING & WICKLIFF,

By (s) ROBERSON L. KING,
(Roberson L. King),
Attorneys for Appellants J. D. Conley, Stanley Moore, Sr., George L. Carter and B. A. Watson.

Address: 618 Prairie Avenue,
Houston, Texas.

COST BOND ON APPEAL

(Filed, March 29, 1955)

(Title Omitted)

We, the undersigned, jointly and severaly acknowledge that we and our personal representatives are bound to pay to Pat J. Gibson, General Chairman of Locals 6051 and 28, Raymond Dickerson, Division Chairman of Locals 6051 and 28, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, A. F. of L. and Local 28 of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Defendants, the sum of Two Hundred Fifty Dollars ($250.00).

The condition of this bond is that, whereas the Plaintiffs have appealed to the Court of Appeals for the Fifth Circuit by notice of appeal filed March 23, 1955, from the judgment of this Court entered March 21, 1955, if the Plaintiffs shall pay all costs adjudged against them if the appeal is dismissed or the judgment affirmed or such costs as the appellate Court may award if the judgment is modified, then this bond is to be void, but if the Plaintiffs fail to perform this condition, payment of the amount of this bond shall be due forthwith.

(s) J. D. CONLEY,
(J. D. Conley),
Southern Pacific Freight Sta.

(s) STANLEY MOORE, SR.,
(Stanley Moore, Sr.),
Southern Pacific Freight Sta.

(s) GEORGE L. CARTER,
(George L. Carter),

Southern Pacific Freight Sta.

(s) B. A. WATSON,
(B. A. Watson),
Southern Pacific Freight Sta.

UNITED STATES FIDELITY AND GUARANTY COMPANY,

By (s) IRENE F. RISDON,
Attorney in Fact, Surety.

(Seal)

CLERK'S CERTIFICATE

United States of America,
Southern District of Texas.

I, V. BAILEY THOMAS, Clerk of the United States District Court for the Southern District of Texas, in the Fifth Circuit and District aforesaid, do hereby certify the foregoing to be a true and correct copy of the record and all proceedings had in the case, as called for in the Designation for Contents of Record on Appeal, Page 1 of this Transcript, in Cause No. 8443 on the Civil Docket of said Court at Houston entitled J. D. Conley, Stanley Moore, Sr., George L. Carter and B. A. Watson vs. Pat J. Gibson, General Chairman of Locals 6051 and 28, et al., as the same now appears on file and of record in my office.

To Certify Which, Witness my hand and the Seal of said Court at Houston, in said District, this the 26th day of April, A. D., 1955.

V. BAILEY THOMAS,
Clerk, United States District Court, Southern District of Texas.

(Seal)

By W. PAUL HARRISS,
(W. Paul, Harriss),
Deputy.

[fol. 29a] [Caption omitted]

[fol. 30] MINUTE ENTRY OF ARGUMENT AND SUBMISSION—November 30, 1955

(Omitted in printing)

[fol. 31] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15566

J. D. CONLEY, STANLEY MOORE, SR., GEORGE L. CARTER, and B. A. WATSON, Appellants,

versus

PAT J. GIBSON, General Chairman of Locals 6051 and 28, et al., Appellees

Appeal from the United States District Court for the Southern District of Texas

OPINION—January 31, 1956

Before Hutcheson, Chief Judge, and HOLMES and RIVES, Circuit Judges

PER CURIAM:

The judgment appealed from is affirmed. Slocomb v. Delaware, L. & W. R. Co., 339 U. S. 239; Hettenbaugh v. Air Line Pilots Association, 189 F. (2) 319.

[fol. 32] IN UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15566

J. D. CONLEY, STANLEY MOORE, SR., GEORGE L. CARTER and B. A. WATSON

versus

PAT J. GIBSON, General Chairman of Locals 6051 and 28, et al.

JUDGMENT—January 31, 1956

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, J. D. Conley, Stanley Moore, Sr., George L. Carter and B. A. Watson, and the surety on the appeal bond herein, United States Fidelity and Guaranty Company; be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

[fols. 33-42] Petition for rehearing covering 4 pages filed February 20, 1956 omitted from this print.

It was denied, and nothing more by order March 15, 1956.

[fols. 43-46] IN UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

MINUTE ENTRY OF ORDER DENYING REHEARING—March 15, 1956

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 47] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 48] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

No. 109

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 8, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. 972 / 109
7

IN THE

Supreme Court of the United States

J. D. CONLEY, STANLEY MOORE, SR., GEORGE L. CARTER AND B. A. WATSON,

Appellants,

v.

PAT. J. GIBSON, GENERAL CHAIRMAN OF LOCALS 6051 AND 28, RAYMOND DICKERSON, DIVISION CHAIRMAN OF LOCALS 6051 AND 28, BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, A. F. OF L. AND LOCAL 28 OF THE BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES,

Appellees

PETITION FOR A WRIT OF CERTIORARI

to the United States Circuit Court of Appeals for the Fifth Circuit

ROBERSON L. KING
Counsel for Petitioners

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IN THE

Supreme Court of the United States

J. D. CONLEY, STANLEY MOORE, SR., GEORGE L. CARTER AND B. A. WATSON,

Appellants,

v.

PAT. J. GIBSON, GENERAL CHAIRMAN OF LOCALS 6051 AND 28, RAYMOND DICKERSON, DIVISION CHAIRMAN OF LOCALS 6051 AND 28, BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, A. F. OF L. AND LOCAL 28 OF THE BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES,

Appellees

PETITION FOR A WRIT OF CERTIORARI

to the United States Circuit Court of Appeals for the Fifth Circuit

Petitioners J. D. Conley, Stanley Moore, Sr., George L. Carter and B. A. Watson, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on January 31, 1956.

Citations to Opinions Below

The opinion of the United States District Court of the Southern District of Texas is unreported and is printed in Appendix B hereof, infra, p. 11. The memorandum opinion of the Circuit Court of Appeals, Fifth Circuit is in the certified copy of the record (R. p. 31), and is officially reported in 229 F. 2d 436 and is printed in Appendix C hereof, infra, p. 16.

Jurisdiction

The Judgment of the Circuit Court of Appeals was entered on January 31, 1956 (R. p. 31). Rehearing was denied on March 15, 1956 (R. p. 43). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

Whether acts or omissions, racially discriminatory in nature, practiced by the exclusive bargaining representative of a craft, against Negro members of the craft, where there are no allegations that the bargaining representative was unlawfully selected nor that the collective agreement is dicriminatory in its provisions, is such a breach of the statutory duty imposed upon such representative by the National Railway Labor Act as might be redressed by Negro members of the craft so harmed by suit in the Federal District Court for injunctive relief and for damages?

Whether the cause of action alleged in the Instant Case, there being a dispute between employees and their representative and not between the union and a Carrier, is within the exclusive original jurisdiction of the National Railroad Adjustment Board because no facts alleging a discriminatory collective bargaining agreement are set out therein?

Statutes Involved

The statutory provisions involved are the National Labor Relations Act 45 U.S.C. 152, 153; 28 U.S.C. 1331, 28 U.S.C. 1254. They are printed in Appendix A hereof, infra p. 9.

Statement

Petitioners, J. D. Conley, Stanley Moore, Sr., George L. Carter and B. A. Watson, Negro employees of the Texas and New Orleans' Houston, Texas Installation (Freight House), filed their complaint against Pat J. Gibson, General Chairman of Locals 6051 and 28, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Raymond Dickerson, Division Chairman of the Two Locals aforesaid and Local 28 of the aforesaid Brotherhood, which is an organization composed solely of members of the white race (R. p. 9), alleging breach of the statutory duty imposed by the National Railway Labor Act by conduct and acts of both omission and commission which sought to discriminate against petitioners because of their race or color. The acts of racial discrimination complained of herein crystalized on or about the 1st day of May, 1954 when many of petitioners were fired summarily and without notice, and were denied a hearing hereon by the said union representative. Petitioners were told that their jobs had been abolished, however, white employees were hired to do many of these same jobs and some of these Negro employees were rehired but were hired with loss of all accrued seniority. No white employees were discharged because of what the union and carrier termed a lease of a portion of the working area to the Southern Pacific Transport Company, which said union termed to be the cause of the job insecurity

affecting petitioners. The petitioners further allege that these acts are calculated to either relieve them from service altogether or to reduce them to the least preferential rank possible, in an effort to subjugate the employment rights of Negro employees to those of the white employees.

Respondents filed their joint motion to dismiss on November 5, 1954 and the Court filed its memorandum opinion on March 16, 1955 denying petitioners the relief sought and entered its final order of dismissal on March 21, 1955.

The Circuit Court of Appeals, Fifth Circuit, affirmed the action of the District Court, by an opinion January 31, 1956.

Reasons for Granting the Writ

1. The decision of the Court below in the Instant Case and in *Hettenbaugh, et al. v. Airline Pilots Ass'n International*, 189 F. 2d 319, upon the authority of which the instant case was decided are directly in conflict with the decision the Fourth Circuit Court of Appeals in *Dillard, et al. v. Chesapeake & O. Ry. Co., et al.*; 199 F. 2d 948. The conflict is evinced by the fact that in the *Dillard* Case, the Court held that the Federal District Court had jurisdiction to try a cause in which Negro plaintiffs charged their collective bargaining representative with acts of racial discrimination which did not involve the negotiation of a racially discriminatory collective agreement, whereas the *Hettenbaugh* Case held that plaintiffs could not maintain an action against their collective bargaining representative for employment discrimination since they did not allege that the defendant union had negotiated a discriminatory collective bargaining agreement. The Court of Appeals in the *Dillard* Case thought that the following cases were applicable: *Steele v. Louisville & N. R. Co.*, 323 U.S. 192; *Tun-*

stall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210; *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768. The appellate Court in the *Hettenbaugh* Case, on the other hand, which the lower courts in the instant case followed, thought the *Steele, Tunstall* and *Howard* Cases, Supra, inapplicable and distinguishable.

2. The decision of the court below is believed to be erroneous and the conflicting decision of the Fourth Circuit Court of Appeals in *Dillard, et al. v. Chesapeake & O. Ry. Co., et al.*, 199 F. 2d 948, supra, correct. In addition, the decision below conflicts with applicable decisions of this Court. The decisions of this Court with which the holding below is in conflict are the *Steele, Tunstall* and *Howard* cases cited under paragraph 1, supra. The *Steele* Case laid the foundation which the two latter cases followed by announcing the rule that an exclusive bargaining agent owes a duty under the National Railway Labor Act to members of the craft whom it represents not to discriminate, and to protect from discrimination, on account of race or color. Though the *Steele* Case involved a discriminatory collective bargaining agreement, it is clear that the broad language of the opinion intended that the Federal Courts protect from any acts of discrimination where Congress clearly had afforded no other means of redress. Hence, even though the *Steele* Case patently involved discrimination as per contract, the Court was still constrained to determine whether petitioners in that case had an adequate remedy before the Railroad Adjustment Board before they could be remanded back to the Federal District Court. This determination the Court made by comparing the language of the Act with the facts and determined that the Act did not provide avenues of redress for the petitioners, in the following language:

> "Section 3, First (i) which provides for reference to the Adjustment Board of "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements", makes no reference to disputes between employees and their representatives. Even though the dispute between the railroad and the petitioner were to be heard by the Adjustment Board, that Board could not give the entire relief here sought. The Adjustment Board has consistently declined in more than 400 cases to entertain grievance complaints by individual members of a craft represented by a labor organization."

The instant case reached a result in conflict with the plain and unambiguous criteria set forth above from the *Steele* Case. For, in the instant case petitioners sue their representative not the carrier. They therefore cannot be brought within the spirit and letter, Sec. 3, First (i) of the Act. The instant case, however, reaches this conflicting result by application of the doctrine of the *Hettenbaugh* Case, supra, which latter case misapplied the doctrine of *Slocum v. Delaware, L. & W. R. Co.*, 339 U.S. 239, which involved a railroad-employee dispute; the *Hettenbaugh* Case applying the law with regard to a railroad-employee dispute to facts involving a dispute between employees and their representatives. The *Slocum* Case decided, in line with the previously applicable Supreme Court decisions interpreting Section 3, First (i) of the Railway Labor Act, that where the carrier sued two unions which were at dispute over the scope of their two respective agreements with the carrier the federal district court was without jurisdiction since questions of interpretation of the collective agreements was concerned. Hence this was the perfect situation involving the coalescence of the two requisites under the

statute to give the Adjustment Board jurisdiction—i.e. - (1) a dispute between carrier and union and (2), a question of the interpretation of an agreement. The *Hettenbaugh* Case did not involve a dispute between a carrier and a union nonetheless it wrongfully applied the principle of law announced in the *Slocum* Case and commended the Plaintiffs to relief afforded by the Adjustment Board.

3. The question presented is of paramount importance because it is concerned principally with the administration of the National Railway Labor Act. Nothing at present indicates precisely how the Supreme Court views this matter of employee-representative suits alleging discriminatory acts not concerned with negotiation of discriminatory contracts, and it is therefore important and necessary that uniformity in construction of the Act be insured to prevent disparity between relief granted which will depend upon the choice of forum or the chance of domicile and the Circuit Court of Appeals which passes upon the controversy.

The question involved is further important because it involves an industry which is so significant to national welfare that it has been made the subject of a separate act with regard to labor relations rather than placing it with other of the nation's industries under a single act (The National Labor Relations Act). A decision in this case is also important because it directly involves not only a significant number of employees in the industry (Negroes) but because it involves a substantial segment of the Negro population of America, employees on the nation's railroads, and hence it is important to America at large.

It is also important to determine whether the Railroad Adjustment Board is the proper tribunal before which to

take such disputes or whether in fact the petitioners, if denied redress in the Federal Courts, would be without remedy save at the behest of their representative, *Steele* Case, Supra.

Conclusion

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROBERSON L. KING
Counsel for Petitioners

DATE: May 21, 1956

APPENDIX A

45 U.S.C. 152
General duties—

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this Act.

45 U.S.C. 153.
National Railroad Adjustment Board.—First. Establishment; composition; powers and duties; divisions; hearings and awards.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act (June 21, 1934), shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

28 U.S.C. 1254
Courts of Appeal-Certiorari-Appeal-Certified Questions.—

Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. 1331

Federal Question-Amount in Controversy.—The District Courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

APPENDIX B

In The
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

J. D. CONLEY, ET AL., :
-vs- : CIVIL ACTION NO. 8443
PAT J. GIBSON, ET AL. :

Dent, Ford, King & Wickliff, (Roberson King), of Houston, Texas; for Plaintiffs.

Fulbright, Crooker, Freeman, Bates & Jaworski (Chester M. Fulton), of Houston, Texas; and Mulholland, Robie & Hickey, of Washington, D.C.; for Defendants.

March 16, 1955

KENNERLY, District Judge:

Plaintiffs J. D. Conley, Stanley Moore, Sr., George L. Carter and B. A. Watson allege in their complaint that they bring this suit under the National Railway Labor Act (Title 45, Section 151, U.S.C.A.).

They say they are citizens of the United States and of the State of Texas, and that they are negro employees of the Texas & New Orleans Railroad Company and/or the Southern Pacific Transport Company, corporations doing business in Houston, Harris County, Texas. That they are members of a national labor union or organization known

as the Brotherhood of Railroad & Steamship Clerks, Freight Handlers, Express and Station Employees (for brevity called "Brotherhood"). That the Brotherhood has in Houston, Texas, a local union or subsidiary composed of white men and known as Local 28, and a similar local union or subsiduary composed of negro men known as Local 6051.

Plaintiffs sue Pat J. Gibson as General Chairman of Locals 6051 and 28, and Raymond Dickerson, Division Chairman thereof. They also sue Local 28. Whether the Brotherhood is sued is not entirely clear, but I am assuming that it is a party defendant herein.

Defendants have moved to dismiss alleging lack of jurisdiction, defect of parties defendant, that Plaintiffs do not in their complaint present a justiciable issue and that such complaint fails to state a claim upon which relief can be granted. This is a hearing under Local Rule 25 of such motion.

1. Plaintiffs allege that Local No. 28 is the bargaining agent of the members of the Brotherhood and has been so designated in pursuance of such Act. That Local 28 has negotiated with such Railroad Company, et al., a working agreement to which Plaintiffs refer in their complaint.[1]

Reference is made to Plaintiffs' complaint as a whole. While Plaintiffs' allegations are not at all clear, the nature of Plaintiffs' case and the relief sought appears to be stated in paragraph three of Plaintiffs' complaint (their prayer) in which they pray that the Court enter a final decree—

> (a) Declaring that the segregation of negro employees of the craft represented by the Brotherhood into a separate local is illegal under the National Labor

[1] A copy of such agreement does not appear to be among the papers in the case.

Relations Act, and is contrary to the Union Shop Agreement of March 1, 1953, and permanently and perpetually enjoin the Brotherhood, its agents, officers, representatives or any of them from requiring plaintiffs to maintain membership in the Union by joining Local 6051, the segregated local—

(b) That the Defendants, and each of them, their servants, agents, members and officers are permanently and perpetually restrained and enjoined from refusing to bargain for plaintiffs and those whom they represent on a basis equal to that afforded to white employees, clerks, who are also represented by the Brotherhood of Railway and Steamship Clerks—

(c) That the defendants, and each of them, their servants, agents, members and officers, are permanently and perpetually restrained from refusing to protect plaintiffs and those whom they represent from discriminatory action because of race or color from whatever quarter emanating.

In paragraph four of their prayer they also pray—

That this Court issue a permanent injunction forever restraining the defendants, and each of them, their agents, servants, officers and members from permitting, or engaging in any discrimination toward plaintiffs and those whom they represent, from allowing plaintiffs jobs to be abolished summarily, and from allowing the discharge of plaintiffs and those whom they represent, the termination of their seniority on account of race or color when employees of the white race, clerks, are not so affected; and that the defendants be restrained from being or purporting to act as exclusive collective bargaining agent with the T. & N. O. Railroad Company concerning grievances, labor disputes, wages, rates of pay, and hours of employment so long as any acts of discrimination continue, and unless and until the defendant, Labor Union, its agents, servants, officers and members give these plain-

tiffs and all of the other negro employees whom they represent, equality of representation on any phase of labor negotiations.

In paragraph five of their prayer they also pray—

> Plaintiffs further pray that this Court award them judgment for damages in the amount of Seventy-five Thousand Dollars ($75,000.00).

Citing Moore v. Illinois Central R. Co., 312 U.S. 630; Order of Railway Conductors v. Pitney, 326 U.S. 561; Slocum v. Delaware, L. & W. R. R. Co., 339 U.S. 239; Order of Railway Conductors v. Southern R. Co., 339 U.S. 255; Hettenbaugh v. Airlines Pilots Assn. International, 189 F. (2d) 319; Hayes v. Union Pacific Co., 84 F. (2d) 337, cert. den. 340 U.S. 942, 88 F. Supp. 108; Kendall v. Pennsylvania Railroad Co. (D.C. Ohio), 94 F. Supp. 875; Van Zandt v. Railway Express Agency (D.C. N.Y.) 99 F. Supp. 520; Butler v. Thompson (C.A. 8), 192 F. (2d) 831, Defendants say in support of their Motion to Dismiss and their claim that this Court is without jurisdiction. That since Plaintiffs raise no question of the (1) *lawfulness of the selection of Local 28 as a bargaining agent,* (2) nor of the *validity of such bargaining agreement,* jurisdiction is not here. That the Federal Courts are not charged with the duty of policing parties in the performance of collective bargaining agreements under such Act. They press the point that this case should be dismissed for lack of jurisdiction. I think and conclude that Defendants' position is well taken and their Motion to Dismiss should be granted.

The case of Moore v. Illinois Central Railroad Company, supra, standing alone may throw some doubt upon this

conclusion, but that case does not stand alone. It has been modified and limited by the many cases cited. The present ruling is well stated by the Court of Appeals for this circuit in Hattenbaugh, et al. v. Airline Pilots Assn:, supra, where it is said:

> "The Congress did not, by the Railway Labor Act, grant jurisdiction to the federal courts to afford relief for breaches of performance of collective bargaining agreements. Appropriate quasi-judicial tribunals have been established for that purpose. Slocum v. Delaware L. & W. R. Co., 339 U.S. 239, 70 S. Ct. 577, 94 L. Ed. 795. It is only when collective bargaining agreements are unlawfully entered into, or when the agreements themselves are unlawful in terms or effect, that federal courts may act. The question of federal jurisdiction being decisive, it is not necessary to consider the other contentions made by the parties. The dismissal of the cause for want of jurisdiction was correct."

Plaintiffs apparently stand upon Steele v. Louisville & Nashville Railroad Co., 323 U.S. 193, and Tunstall v. Brotherhood, 323 U.S. 211, but those cases are fully considered and differentiated by the Court of Appeals of the Ninth Circuit in Hayes v. Union Pacific R. Co., cited above.

Because of my conclusion that this Court is without jurisdiction, it is not necessary to discuss the other question presented.

Let an order be drawn and presented dismissing the case.

The Clerk will file this
opinion.

/s/ T. M. KENNERLY
United States District Judge

APPENDIX C

In The

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 15566

J. D. CONLEY, STANLEY MOORE, SR., GEORGE L. CARTER, and B. A. WATSON,
Appellants,

versus

PAT J. GIBSON, GENERAL CHAIRMAN OF LOCALS 6051 and 28, ET AL.,
Appellees

Appeal from the United States District Court for the Southern District of Texas

---

(January 31, 1956)

Before HUTCHESON, Chief Judge, and HOLMES and RIVES, Circuit Judges. PER CURIAM:

The judgment appealed from is affirmed. Slocumb v. Delaware, L. & W. R. Co., 339 U.S. 239; Hettenbaugh v. Air Line Pilots Association, 189 F. (2) 319.

[Seal]
A true copy
Test: JOHN A. FEEHAN, JR.,
Clerk, U. S. Court of Appeals, Fifth Circuit

By CLARA R. JAMES
Deputy

New Orleans, Louisiana
Mar. 27, 1956

Office - Supreme Court, U.S.
FILED
AUG 2 5 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 7

J. D. CONLEY, STANLEY MOORE, SR., GEORGE L. CARTER AND B. A. WATSON, *Petitioners*

vs.

PAT J. GIBSON, GENERAL CHAIRMAN OF LOCALS 6051 AND 28, RAYMOND DICKERSON, DIVISION CHAIRMAN OF LOCALS 6051 AND 28, BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, A. F. OF L., ET AL., *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S BRIEF

JOSEPH C. WADDY
ROBERSON L. KING
Counsel for Petitioners

ROBERT L. CARTER
WILLIAM C. GARDNER
WILLIAM B. BRYANT
Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 7

J. D. CONLEY, STANLEY MOORE, SR., GEORGE L. CARTER AND B. A. WATSON, *Petitioners*

vs.

PAT J. GIBSON, GENERAL CHAIRMAN OF LOCALS 6051 AND 28, RAYMOND DICKERSON, DIVISION CHAIRMAN OF LOCALS 6051 AND 28, BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, A. F. OF L., ET AL, *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S BRIEF

Opinions Below

The opinion of the United States District Court for the Southern District of Texas was filed March 16, 1955, and appears on page 19 of the Transcript of Record.

The per curiam opinion of the United States Court of Appeals for the Fifth Circuit is officially reported in 229 F. 2d 436, and is printed in the Transcript of Record at page 29a.

A petition for rehearing was denied without opinion by the United States Court of Appeals for the Fifth Circuit on March 15, 1956 (R. 30).

Jurisdiction

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered January 31, 1956. Rehearing was denied March 15, 1956.

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 of the United States Code.

Statutes Involved

The Statute involved is the Railway Labor Act as amended, 45 United States Code, Section 151, et seq., and particularly the following:

Section 152:

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. . . ."

"Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted —

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization

representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member. . . ."

Section 15

"First (i). The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the Chief Operating Officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

Questions Presented

Whether a complaint by Negro members of a craft of railway employees against a labor union—their collective bargaining representative under the Railway Labor Act—alleging that, solely because of their race, the union bars them from membership in its local lodge which carries on the collective bargaining process; uses its statutory position to compel them to maintain membership in an inferior, racially segregated local; refuses to exert any effort toward maintenance of the collective agreement insofar as it pertains to the Negro members of the craft, resulting in their loss of employment and employment rights; and refuses either to hear their charges of discrimination or to take any steps to investigate and redress their wrongs, states a claim against the bargaining representative within the jurisdiction of the Federal courts for breach of the statutory duty of fair representation imposed upon such repre-

sentative by the Railway Labor Act, notwithstanding the fact that the complaint makes no claim other that the collective agreement was unlawfully entered into or is unlawful in its terms or effect?

(a) If jurisdiction exists, is there present in this case any factor either ousting or limiting that jurisdiction?

Statement of the Case

Petitioners, employees of the Texas and New Orleans Railroad Company in its Freight House at Houston, Texas, are Negroes and are members of the craft or class of clerks, freight handlers, express and station employees of that company. (R. 7). The craft is composed of both white and colored employees and is represented for collective bargaining purposes under the Railway Labor Act by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter called the Brotherhood). (R. 7, 8). There is an agreement, enacted pursuant to Section 2—Eleventh of the Railway Labor Act, 45 U.S.C.A. 152—Eleventh, (commonly known as a "union shop agreement"), in effect between the Brotherhood and the carrier, requiring all members of the craft or class, as a condition of continued employment, to become members of the Brotherhood. (R. 10). The Brotherhood maintains two local lodges at Houston for the members of the craft —Local 28, composed exclusively of white employees, and Local 6051, composed exclusively of Negro employees. Petitioners and those they represent are barred from membership in Local 28, and are forced to maintain membership in Local 6051. (R. 9, 10). The Brotherhood carries on its collective bargaining with the carrier through Local 28. (R. 9, 10).

On August 21, 1954, petitioners brought a class suit in the United States District Court for the Southern District of Texas, on behalf of themselves and others similarly situated, against the Brotherhood, two of its officials and Local 28, in which they charged that Local 6051, which the

Negro members of the craft are compelled to join, is a segregated, inferior unit of the Brotherhood, maintained solely for the purpose of affording petitioners and those similarly situated representation inferior to and different from that afforded white members of the craft in Local 28 (R. 9, 10); and also that the Brotherhood has refused to afford petitioners and the other Negroes similarly situated representation and protection equal to that afforded those members of the craft who are white (R. 10, 13). The railroad company, their employer, was not made a party to the suit.

Petitioners complained that on or about May 1, 1954, their employer posted a notice at the Freight House allegedly abolishing 45 jobs; that all of these jobs were being held by Negro members of the craft; that no advance notice of the abolition of the jobs was given to petitioners and those similarly situated as required by the collective bargaining agreement (R. 11); that said jobs were not in fact abolished, for immediately thereafter many white persons were hired to perform the same work, and subsequently, some of the same Negro employees who had been previously fired were rehired, but without seniority, and junior to the recently hired white employees (R. 12); and that none of the white members of the craft were discharged or displaced (R. 13). Petitioners further charged in their complaint that the Brotherhood suffered and permitted their jobs to be abolished because of their race and also that the Brotherhood repeatedly refused to grant petitioners a hearing concerning their discharge and declined to come to their aid (R. 11, 12). They alleged that the acts and omissions of the Brotherhood, complained of in this case, constituted a planned course of conduct designed to discriminate against petitioners and those similarly situated, solely because of their race or color, and that by reason of said acts and in refusing to represent them and to give them protection equal to that afforded the white members of the craft, the Brotherhood breached the statutory duty im-

posed upon it by the Railway Labor Act to represent all members of the craft fairly and impartially (R. 13). They further alleged that, by reason of this conduct by the Brotherhood, petitioners and those similarly situated have been deprived of rights and property without due process of law in violation of the Fifth Amendment to the United States Constitution. They prayed for a declaratory judgment, injunctive relief and damages.

The defendants moved to dismiss the complaint on four grounds: (1) lack of jurisdiction of the subject matter; (2) lack of an indispensable party defendant—the railroad company; (3) failure to present a justiciable issue, and (4) failure to state a claim upon which relief can be granted. The District Court dismissed the complaint for lack of jurisdiction of the subject matter. On appeal by petitioners to the United States Court of Appeals for the Fifth Circuit that Court, without discussion, affirmed, in a per curiam opinion, citing *Slocum* vs. *Delaware, L. & W. R. Co.*, 339 U. S. 239, and *Hettenbaugh* v. *Air Line Pilots Association*, 189 F. 2d 319. A petition for rehearing was denied without opinion.

Summary of Argument

The cause of action stated in the complaint is one over which Federal Courts have jurisdiction because it charges the Brotherhood with breach of the statutory duty of fair representation it owed to petitioners as members of a craft of railway employees for which that Brotherhood was the exclusive representative, and with unlawful abuse of statutory position and power. The Brotherhood violated its duty and abused its statutory powers by compelling petitioners, solely on account of their race, to maintain membership in an inferior, ineffective, segregated local of the union, cut off from the local that carried on the collective bargaining, and then refusing to hear the complaints or to take any steps within the collective bargaining process to enforce the rights of petitioners, thus denying to them the benefits and ad-

vantages of collective bargaining. The duty imposed on the bargaining representative by the Railway Labor Act to represent all members of the craft fairly is not limited to the making of a contract but is coextensive with the total authority and power given the representative by the statute. A refusal by the Brotherhood to represent members of the craft, solely on account of race, in any portion of the collective bargaining process is a breach of that duty.

Neither the provisions of the Railway Labor Act nor the doctrine of primary jurisdiction precludes the court from exercising jurisdiction in this action by Negro members of a craft of railway employees, charging their bargaining representative with violation of statutory duty and unlawful abuse of power because (1) such a dispute has not been relegated by the statute to the administrative tribunals created by the Act; (a) the dispute does not involve the interpretation or application of the collective bargaining agreement; (b) the provision of the statute creating the National Railroad Adjustment Board makes no reference to disputes between employees and their representative; (2) No administrative expertise or specialized skill is needed to determine the existence or non-existence of racial discrimination by the bargaining representative in this case, and (3) even if the Adjustment Board had the power to act in this case, it would not constitute an adequate administrative remedy because the very Brotherhood against whom petitioners complain sits as judge on that Board.

ARGUMENT

I. The Complaint Charges The Brotherhood With Breach of the Duty of Fair Representation Imposed Upon It By The Railway Labor Act And With Unlawful Abuse of Statutory Position and Power and, Therefore, Is Within The Jurisdiction of the Court

In 1944 this Court, in the case of *Steele* v. *Louisville & Nashville R. Co., et al.*, 323 U. S. 192, 89 L. Ed. 173, held

that the bargaining representative of a craft of railway employees is under a duty imposed by the Railway Labor Act to represent all members of the craft for which it acts, fairly, impartially and without hostile discrimination, and stated that:

> "So long as a labor union assumes to act as the statutory bargaining representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft." (323 U. S. 192, 204).

This Court held also that a complaint alleging a breach by the collective bargaining representative of that statutory duty states a claim upon which courts have jurisdiction to grant relief and that:

> ". . . the statute contemplates resort to the usual judicial remedies of injunction and award of damages when appropriate for breach of that duty." (323 U. S. 192, 207).

In a companion case decided on the same day as *Steele*, this Court held that Federal Courts have jurisdiction of the subject matter of a complaint charging the bargaining representative with breach of the statutory duty of fair representation.

> *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210, 89 L. Ed. 187 (1944).

The principles of the *Steele* and *Tunstall* cases were re-affirmed by this Court in *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, 338 U. S. 232, 94 L. Ed. 23 (1949), and were re-affirmed and extended in *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U. S. 768, 96 L. Ed. 1293 (1952), where this Court held that the Railway Labor Act prohibits bargaining agents it authorizes from using their position and power to destroy colored workers' jobs in order to bestow them on white workers and stated that:

> "Bargaining agents who enjoy the advantages of the Railway Labor Act's provisions must execute their trust without lawless invasions of the rights of other workers." (343 U. S. 768, 774).

These principles have been followed by the United States Circuit Court of Appeals for the Fourth Circuit in *Rolax, et al.* v. *Atlantic Coast Line R. Co., et al.*, 186 F. 2d 473 (1951), and *Dillard* v. *Chesapeake & Ohio R. Co.*, 199 F. 2d 948 (1952), and by the United States Court of Appeals for the Fifth Circuit in *Brotherhood of Locomotive Firemen and Enginemen* v. *Mitchell*, 190 F. 2d 308 (1951), *Central of Georgia Railway Co.* v. *Jones*, 229 F. 2d 648 (1956), and in *Richardson, et al.* v. *Texas & New Orleans R. Co.*, et al., 242 F. 2d 230 (1957).

From the above cited cases it is clear that jurisdiction of courts, both State and Federal, to hear and determine suits brought by members of a craft of railroad employees against their statutory collective bargaining representative, to redress wrongs resulting from unfair representation and to obtain relief from racially discriminatory practices and contracts, is no longer a subject for debate. Nevertheless, in the instant case, the courts below refused to apply these established principles because of the absence of any allegation in the complaint that the collective agreement was unlawful in itself. This action by the courts below pre-supposes the existence of a doctrine of law to the effect that the right of members of a craft of railway employees to fair representation by their collective bargaining representative under the Railway Labor Act is judicially enforceable only when the collective bargaining agreements are unlawfully entered into, or when the agreements themselves are unlawful in terms or effect. Petitioners respectfully urge that the doctrine espoused by the lower courts is unsound in principle; subverts the intention of Congress in enacting the Railway Labor Act and is in the teeth of the pronouncements of this Court.

It is unsound in principle because the exclusion from judicial enforcement of all rights to fair representation except those incident to contract-making leaves the statutory bargaining representative with unbridled power to otherwise discriminate with impunity against members of the craft and free to otherwise use its statutory position and power in a lawless and arbitrary manner, to the detriment of the minority members of the craft for which it is authorized to act.

In enacting the Railway Labor Act to provide for the peaceful maintenance of agreements and settlement of disputes between employer and employee through a continuous process of collective bargaining, Congress saw fit to provide for an exclusive bargaining representative, to be chosen by the majority of the craft, and to vest that representative with the power of complete control of all craft activities and incidents and to legislate for and bind the individual and minority members of the craft even against their will. To protect the individual and minority members from abuse of this statutory power it imposed upon that representative the duty to represent all members of the craft. Clearly, it did not intend to limit this duty or to restrict the right to only one phase of the total authority and power granted. On the contrary, it must be assumed that Congress intended to make that duty coextensive with the total authority and power given the representative by the Act. Otherwise, the Act would bear the condemnation of unconstitutionality under the Fifth Amendment.

Petitioners' contentions in this respect are buttressed further by the legislative history of the Union Shop Amendment to the Act (45 U. S. C., Section 152, Eleventh). This amendment increased the power of the representative over the individual employee by making it lawful for the representative to make an agreement with the carrier requiring that, as a condition of continued employment, all members of the craft must join the union. However, in reporting this legislation to the floor of the Senate the Committee

was careful to make it clear that the grant of authority carried with it the duty to represent. The Committee stated in its report:

> "Your committee also desires to make it clear that nothing in this bill is intended to modify in any way the requirement that the authorized bargaining representative shall represent all the employees in the craft or class, including non-union employees as well as members of the union, fairly, equitably, and in good faith. (See *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U. S. 192, and *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210)." (Senate Report No. 2262, 81st Congress, 2d Session).

The making of a collective bargaining agreement does not complete the collective bargaining process nor exhaust the statutory power of the representative. There is the continuing process of day to day adjustments and periodic discussions concerning such matters as shop rules, job content, and work assignments. These matters, vital to the employment of every member of the craft, have been placed by the Railway Labor Act in the hands of an exclusive bargaining representative. To the extent that the representative participates in this process, it exercises a power which is conferred, defined, regulated and protected by the statute. This Court pointed out in *J. I. Case Co.* v. *National Labor Relations Bd.*, 321 U. S. 332, 88 L. Ed. 762 (1944) that:

> "The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit." (321 U. S. 332, 338);

and in *Steele*, supra:

> "The purpose of providing for a representative is to secure those benefits for those who are represented and not to deprive them or any of them *of the benefits of collective bargaining* for the advantage of the repre-

sentative or those members of the craft who selected it." (323 U. S. 192, 201). (Italics ours.)

Thus, a refusal by the bargaining representative to exercise these non-contract making collective bargaining powers on behalf of Negro members of the craft, solely on account of their race, is a refusal by it to represent all members of the craft, depriving the Negroes of the benefits and advantages of collective bargaining, and constitutes the creation of distinctions within the craft based on race alone.

This Court held in the *Steele* case, supra, that distinctions based on race alone are "obviously irrelevant and invidious" and that "Congress plainly did not undertake to authorize the bargaining representative to make such discriminations." (323 U. S. 192, 203).

The complaint in this case alleges that the Brotherhood used the power conferred upon it by the statute to compel petitioners and the other Negro employees to join and maintain membership in the union. However, it barred them from membership in that local which carries on the collective bargaining for the craft and forced them into an inferior, segregated local, and refused to hear or consider the complaints of the Negroes concerning their welfare as members of the craft. It made an agreement with the carrier covering the craft and then arbitrarily refused to take any steps within the collective bargaining process to enforce the rights of Negro employees covered by that contract. Thus, on the one hand, it abuses its statutory powers and, on the other, it abnegates its statutory duty. Its conduct was a denial to the Negro members of the craft those benefits and advantages of collective bargaining which this Court has held must be open to every member of the represented unit. Here is a clear case of a bargaining representative using Federal statutory power, solely for its own benefit, by compelling the Negro members of the craft to pay hard-earned money into its coffers and then refusing to represent them within the collective bargaining process. Such conduct on the part of the bargaining representative

subverts the purpose of the Railway Labor Act; is unmistakably a refusal on the part of the Brotherhood to represent all members of the craft fairly, and constitutes an unlawful abuse of statutory powers, which under the principles enunciated by this Court in *Steele*, supra, *Tunstall*, supra, *Graham*, supra, and *Howard*, supra, and by the Fourth Circuit in *Dillard* v. *Chesapeake & Ohio Railroad Co.*, supra, courts have jurisdiction to correct and restrain.

It is respectfully submitted that the Courts below erred in refusing to apply the principles of the above-mentioned cases and that, to the extent that *Hettenbaugh* v. *Air Line Pilots Association*, 189 F. 2d 319 (1951), and *Hayes* v. *Union Pacific Railroad Co.*, 184 F. 2d 337, cert. den. 340 U.S. 942, (1951) (cited and relied upon by the courts below in support of their position) may be in conflict with those principles, they are unsound and do not accurately state the law.

II. There Are No Factors Present In This Case Either Ousting or Limiting The Jurisdiction of The Court

As has been shown above, when the complaint in this case is tested by the well settled principles of law applicable to rights and duties arising under the Railway Labor Act, it is immediately apparent that this case falls within the general jurisdiction of Federal Courts. Unless there is present some factor either ousting or limiting that jurisdiction, the justiciability of the cause is beyond question.

The courts below held that the quasi-judicial tribunals established by the Railway Labor Act preclude the courts from exercising jurisdiction. This holding was predicated upon the view that the case was one involving the breach of performance of a collective bargaining agreement. Petitioners contend that this view is erroneous and that the case alleged must be looked upon as one involving a breach of the statutory duty imposed upon the Brotherhood by the Railway Labor Act.

This complaint does not involve a dispute between an employee or group of employees on the one hand, and a carrier or carriers on the other. The railroad company is not even a party to the suit. Although petitioners may have concurrently a claim against their employer for violation of the collective agreement, that claim is not asserted in this case. The dispute petitioners seek to have adjudicated is entirely between them and their statutory representative. The rights here sought to be enforced do not stem from any contract between the carrier and the representative, but directly from the statute, and may be adjudicated without in any manner considering whether there was or was not, in fact, a breach of the collective agreement by the carrier. What must be considered and determined is whether there was a breach by the Brotherhood of the statutory duties imposed upon it to represent all members of the craft fairly and to refrain from using its statutory position and power to discriminate against the Negro members of the craft.

When viewed in this, its true light, it becomes obvious that the dispute here is not one that Congress relegated for adjudication to the administrative tribunals created by the Railway Labor Act but is one that was left to the jurisdiction of the courts. It also becomes obvious that the courts below erroneously applied the doctrine of the *Slocum* case (*Slocum v. Delaware, L. & W.*, 339 U.S. 239, 94 L. Ed. 795 (1950)).

In that case, two unions were vying with each other over certain jobs—each claiming the jobs for its members under its respective collective bargaining agreement. The railroad company was caught in the vise and it brought an action in a New York State court against both unions for a declaratory judgment and prayed for an interpretation of both agreements. This Court held that disputes between carriers and their employees involving the interpretation of collective bargaining agreements fell within the exclusive jurisdiction of the National Railroad Adjustment Board created by the Railway Labor Act.

There is no parallel in the facts alleged in this case to those involved in the *Slocum* case, supra. Here, the suit is brought by individual members of the craft against their collective bargaining representative alone, seeking enforcement of statutory rights especially designed for their protection and welfare. Those rights inhere in the relationship of craft member—craft representative created by the statute and are in no way dependent upon the interpretation of the collective agreement.

Furthermore, no administrative procedure was created by the Railway Labor Act for the determination of disputes between the employee and his statutory bargaining representative. This Court stated in *Steele*, supra, that:

> "Section 3, First (i), which provides for reference to the Adjustment Board of disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements' *makes no reference to disputes between employees and their representative.*" 323 U.S. 192, 205. (Italics ours.)

Since the dispute in this case is between members of the craft and their statutory representative, courts must exercise jurisdiction or leave the members of the craft without remedy. The rights to fair representation and freedom from unlawful abuse of statutory power would be sacrificed and obliterated if courts were without power to redress for violations of those rights.

Petitioners urge also that the doctrine of primary jurisdiction is no bar to the exercise of jurisdiction by the court. This Court has limited this doctrine of prior resort so as to make its applicability dependent upon (1) the nature of the question presented and (2) adequacy of the administrative remedy. Thus it would seem that only those questions which require the skill of administrative specialists and the exercise of specialized judgment should be placed beyond traditional judicial scrutiny and relegated for initial determination to an administrative agency.

Great Northern R. Co. v. *Merchants Elevator Co.*, 259 U.S. 285, 66 L.Ed. 943 (1922).

And where the administrative remedy is inadequate, or the failure of the court to exercise jurisdiction would result in a sacrifice or obliteration of the right involved, prior resort to the administrative agency will not be required.

Georgia v. *Pennsylvania R. Co.*, 324 U.S. 439, 89 L. Ed. 105 (1945).
Steele v. *Louisville & Nashville R. Co.*, supra.

Inasmuch as an interpretation of the collective agreement is neither necessary nor required in this case, no administrative expertise nor specialized skill and judgment is needed for a determination of the issues involved. As has been pointed out, the Railway Labor Act has not placed jurisdiction in the National Railroad Adjustment Board of disputes between employees and their representative. Furthermore, the Brotherhood has its own representative on the Adjustment Board. That representative is paid by the Brotherhood and has no fixed term of employment, but is recallable at the will of the Brotherhood. Thus to require petitioners to submit their case to the Adjustment Board would be to compel them to have their rights adjudicated by the very same persons who are destroying them. Moreover, this Court has already held that where a collective bargaining representative engages in hostile discrimination against Negro members of a craft, those discriminated against are without adequate administrative remedy, and prior resort to the agencies created by the statute is not required.

Steele v. *L. & N. R. Co.*, supra.
Brotherhood of Railroad Trainmen v. *Howard*, supra.

Petitioners conclude, therefore, as this Court did in *Steele*, supra:

> "In the absence of any available administrative remedy, the right here asserted, to a remedy for breach of

the statutory duty of the bargaining representative to represent and act for the members of a craft, is of judicial cognizance. That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which is their duty to give in cases in which they have jurisdiction. . . *For the present command there is no mode of enforcement other than resort to the courts*, whose jurisdiction and duty to afford a remedy for a breach of statutory duty are left unaffected." (323 U.S. 192, 207). (Italics ours).

CONCLUSION

It is respectfully submitted that this complaint, charging abuse of Federal statutory power and disregard of statutory obligation by the Brotherhood and the use by it of its position to discriminate against Negro members of the craft, solely because of their race, is of judicial cognizance, and that the courts below erred in dismissing for lack of jurisdiction of the subject matter.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. ~~109~~ 53

J. D. CONLEY, STANLEY MOORE, SR., GEORGE L. CARTER and B. A. WATSON, *Petitioners*,

v.

PAT J. GIBSON, General Chairman of Locals 6051 and 28, RAYMOND DICKERSON, Division Chairman of Locals 6051 and 28, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, A. F. of L. and LOCAL 28 OF THE BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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Railway Labor Act, 45 U.S.C. Section 151 et seq.:

Section 2 Fourth, 45 U.S.C. Section 152 Fourth 20
Section 3 First (i), 45 U.S.C. Section 153 First (i) 3
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IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. 109

J. D. CONLEY, STANLEY MOORE, SR., GEORGE L. CARTER and B. A. WATSON, *Petitioners*,

v.

PAT J. GIBSON, General Chairman of Locals 6051 and 28, RAYMOND DICKERSON, Division Chairman of Locals 6051 and 28, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, A. F. of L. and LOCAL 28 OF THE BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Texas is not officially reported but is printed as Appendix B to the Petition for Certiorari. The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 229 F. 2d 436, and is also printed as Appendix C to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

RESTATEMENT OF QUESTIONS PRESENTED

We think a proper statement of the questions presented by the Petition, or necessarily involved if the judgment below is reviewed, are as follows:

1. Whether the District Court correctly held that under the Railway Labor Act it lacked jurisdiction to entertain a complaint the facts of which allege racial discrimination by a railroad not in the terms or in the making of a collective bargaining agreement but solely because of its asserted unlawful application to Petitioners;

2. Whether the exclusive jurisdiction of the National Railroad Adjustment Board under the Railway Labor Act, over disputes between railroads and their employees involving the interpretation or application of agreements concerning rates of pay, rules, or working conditions, can be successfully avoided by a litigant simply through the device of not naming the railroad as a party defendant and proceeding solely against the bargaining representative, even though the facts alleged by the complaint assert wrongful application of the agreement only by the railroad, allege no violation of the agreement by the representative, and make only the claim that the representative declined to protest the action of the railroad;

3. Assuming, *arguendo*, that the District Court and not the Railroad Adjustment Board had jurisdiction over the subject matter of the complaint, whether its

judgment of dismissal was nevertheless correct because of failure of the complaint to state a claim upon which relief can be granted against the union defendants or because of lack of an indispensable party defendant.

STATUTE INVOLVED

Petitioners mistakenly refer to the applicable statute as the National Labor Relations Act instead of the Railway Labor Act, the only provision of which involved in this case is Section 3 First (i), 45 U.S.C., Section 153 First (i). This provision reads as follows:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

RESTATEMENT OF THE CASE

Since in our view the statement of the case provided by Petitioners is inadequate to acquaint the Court with the real problem involved unless the Court itself reads and analyzes the complaint (R. 3-16)[1], we make this restatement.

[1] Record references throughout this brief are to the printed transcript of the record filed in the United States Court of Appeals for the Fifth Circuit, copies of which have been filed with this Court pursuant to Rule 21(4).

(a) The Complaint

The factual allegations of the complaint (R. 3-16), while not at all clear as to either the injuries allegedly suffered by petitioners or the specific legal rights alleged to have been invaded by respondents, may be summarized as follows:

Petitioners (plaintiffs below) are Negro employees of the Texas and New Orleans Railroad Company (herein referred to as the Railroad) and the Southern Pacific Transport Company (herein called the Transport Company) and are members of Local 6051 of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes. Petitioners instituted this suit on their own behalf and allegedly as representatives of other Negro employees of the Railroad and the Transport Company similarly situated.

Respondents (defendant below) are labor organizations and officers thereof. The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes (herein called the Brotherhood) is a standard international labor organization with its headquarters and principal place of business located at Cincinnati, Ohio, and is the duly selected and legally constituted bargaining representative of certain employees of the Railroad, including petitioners. Locals 28 and 6051 are labor organizations affiliated with the Brotherhood whose membership is made up of employees of the Railroad. Pat J. Gibson is General Chairman of the Brotherhood on the Railroad and Raymond Dixon[2] is Division Chairman.

[2] Through error, petitioners have called Mr. Dixon "Dickerson" in their complaint and Petition.

Since November 1, 1939, an agreement entered into pursuant to the provisions of the Railway Labor Act (45 U.S.C. Sec. 151 et seq.) has been in effect between the Railroad and the Brotherhood governing the rates of pay, rules, and working conditions of the employees of the Railroad which the Brotherhood represents.

It is alleged that on May 1, 1954, the Railroad posted on the bulletin board at its Houston Freight House (where all petitioners were employed) a notice stating that approximately 45 jobs were being abolished. Petitioners believe, but do not allege as a fact, that only those jobs held by Negro employees were abolished. It is claimed that this notification was improper under the terms of the collective bargaining agreement. The complaint does not set forth any particular provision of the agreement on which petitioners rely, and, indeed, since the Railroad was not made a party respondent, the complaint is completely vague as to who petitioners considered was required by the agreement to give proper notice of job abolishments.

The complaint further alleges that respondents did not inform petitioners of the circumstances which caused the notice to be posted. The claim is made in general terms that respondents allowed the abolishment of the jobs to take place "without in any manner coming to the aid of plaintiffs and those whom they represent; and did decline to hear plaintiffs on this question of discharging repeatedly and without reason". (R. 11) Petitioners admit, however, that respondents did inform them that the abolishment of the jobs was due to the leasing by the Railroad to the Transport Company of certain portions of the docks at the Houston Freight House, and that nothing could be done about it. (R. 12)

It is further alleged that the jobs listed as having been abolished were not in fact abolished because persons were immediately hired by the Transport Company to perform them. The claim is made that many white men were hired to fill these jobs and that later on some Negroes, whose jobs had been abolished by the Railroad, were hired but without seniority—petitioners apparently contending that the seniority rights acquired by the Negro employees of the Railroad should have been credited to them when they were hired by the Transport Company. (R. 12)

There are other allegations to the effect that Negro employees of the Railroad have been displaced from permanent positions and placed on a so-called "Break Out" while this has not occurred to white employees, and that petitioners believe that no white employees represented by the Brotherhood have been displaced. (R. 12-13) The complaint avers that the foregoing acts "constituted a planned course of conduct designed to discriminate against them [plaintiffs] because of their race or color".[3]

[3] The complaint further alleges unlawful segregation of Negro members of the Brotherhood into a separate lodge (Local 6051), which the complaint seeks to have enjoined by the court as unlawful. Although argued below, this issue has apparently been abandoned by petitioners because it is omitted in their Petition. In any event, the short answer to the claim of illegality is that there is no allegation that any of petitioners have sought to obtain admission to the white lodge (Local 28), have ever been denied such right, have refused to join the Negro local, or have been deprived of any employment rights under the Railway Labor Act as the result of the separation of white and Negro lodges. Consequently, we took the position in the District Court that in the absence of any allegation of the deprivation of an established legal right, the claim was non-justiciable. See *Taylor* v. *Brotherhood of Railway & Steamship Clerks*, 106 F. Supp. 438.

Declaratory and injunctive relief and damages in the amount of $75,000 are sought for alleged violations of petitioners' rights under the Federal Constitution, the Railway Labor Act, and the collective bargaining agreement. Injunctions are sought to restrain respondents from refusing to bargain for petitioners on a basis equal to that afforded white employees, from refusing to protect petitioners from discriminatory action, from allowing petitioners' jobs to be abolished, and from acting as the bargaining representative until discrimination ceases and petitioners are accorded equality of representation. (R. 14-16)

The foregoing constitutes the discrimination of which petitioners complain in their Petition. It is to be noted specifically that the complaint contains no allegation whatsoever that the collective bargaining agreement between the Railroad and the Brotherhood is discriminatory or illegal in any of its provisions or that it was illegally entered into by the Brotherhood or the Railroad. It is simply alleged in general terms, without any supporting factual allegations or specifications, that respondents have applied the agreement in a discriminatory manner. Even here the complaint is completely vague as to what provisions of the agreement have been violated or what duties or obligations under it owed by respondents have been denied petitioners. Actually, the alleged discriminatory conduct would appear to be limited to a passiveness on the part of the respondents toward reduction of forces by the Railroad. No where in the complaint is it alleged that the respondents conspired with the Railroad regarding the abolishment of the 45 jobs or that the respondents took any action in the alleged deprivation of petitioners' rights.

Accordingly, insofar as the complaint even purports to state a cause of action it is limited to the claim that certain discriminatory conduct was practiced upon petitioners by the Railroad in the administration of the bargaining agreement through the abolishment of certain positions and the rehiring without proper seniority of Negroes in other jobs, which conduct the Brotherhood allowed to happen and did nothing about.

(b) Proceedings in and Action by the District Court and Court of Appeals

As its responsive pleading to the complaint, respondents filed a motion to dismiss the action (R. 17-18) upon the following grounds:

(1) that the court lacks jurisdiction over the subject matter of the action because Congress had granted to the National Railroad Adjustment Board exclusive jurisdiction of actions involving the application or interpretation of collective bargaining agreements;

(2) that the Railroad, which took the action of abolishing jobs of which petitioners complain and is a party to the bargaining agreement upon which petitioners base their rights, is an indispensable party respondent to the proceeding but has not been joined by the petitioners;

(3) that the complaint completely fails to present any justiciable issue with respect to its allegations concerning segregation under the union shop agreement; and

(4) that in many respects, as indicated in the foregoing statement concerning the allegations of the complaint, the complaint fails to state a claim upon which relief can be granted.

On March 16, 1955, the District Court filed a memorandum opinion in which it held that since the substance of the complaint was a claim that petitioners had been denied rights through alleged improper performance of a collective bargaining agreement, the court lacked jurisdiction. It specifically considered and rejected petitioners' contention that the decision of this Court in *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 193, and *Tunstall* v. *Brotherhood*, 323 U.S. 211, were applicable, and supported its conclusion by reliance upon a decision of the United States Court of Appeals for the Ninth Circuit in *Hayes* v. *Union Pac. R. Co.*, 184 F. 2d 337, *cert. den.* 340 U.S. 942, as well as the decision of the United States Court of Appeals for the Fifth Circuit in *Hettenbaugh* v. *Airlines Pilots Ass'n International*, 189 F. 2d 319. It further held that because of lack of jurisdiction over the subject-matter of the complaint, it was not necessary to discuss the other grounds upon which the respondents had moved to dismiss. (R. 19-24)

On March 21, 1955, the District Court entered its judgment granting the motion to dismiss (R. 24-25), from which judgment the petitioners took an appeal to the United States Court of Appeals for the Fifth Circuit (R. 26).

On January 31, 1956, in a per curiam decision (R. 31; Appendix C of Petition), the United States Court of Appeals affirmed the judgment of the District Court, 229 F. 2d 436. Petition for rehearing was denied on March 16, 1956 (R. 43) and the petition for writ of certiorari was filed on May 24, 1956.

ARGUMENT

The issues in the present case uniquely turn upon their own facts and will affect few, if any, other litigants. Contrary to the statement in the Petition (p. 7) that the question is a novel one of importance in the administration of the Railway Labor Act, this Court has already denied a petition for certiorari in a case the facts of which are substantially identical with those here involved. *Hayes* v. *Union Pac. R. Co.*, 184 F. 2d 337, *cert. den.*, 340 U.S. 942.

I.

THE DECISION BELOW IS CONSISTENT WITH DECISIONS OF THIS COURT AND IS CLEARLY CORRECT

The District Court properly held that under the Railway Labor Act it lacked jurisdiction to entertain a complaint the facts of which allege racial discrimination by a railroad not in the terms or making of a collective bargaining agreement but solely because of its asserted unlawful application to petitioners. As indicated in the foregoing Restatement of Questions Presented, the allegations of the complaint do not concern the negotiation of a discriminatory collective bargaining agreement; the claim is that petitioners have been denied rights under an existing valid agreement by alleged improper performance or application of that agreement by the Railroad. As stated in the Petition, the racial discrimination complained of consisted of acts by the Railroad in firing petitioners summarily without notice, abolishing their jobs, hiring white employees to do many of the same jobs, and rehiring some of the negro employees but with loss of accrued seniority. There is no claim in the complaint that respondents did any of these things. The sole claim against respondents is that they allowed the Railroad

to abolish the jobs "without in any manner coming to the aid of plaintiffs and those whom they represent; and did decline to hear plaintiffs on this question of discharging repeatedly and without reason." (R. 11) It is admitted in the complaint, however, that respondents did inform petitioners that the abolishment of the jobs was due to the leasing by the Railroad to the Transport Company of certain portions of the dock at the Houston Freight office and that nothing could be done about it. (R. 12)

Consequently, the claim of unlawful conduct by respondents amounts simply to a charge that because they did not believe that a grievance presented by petitioners had merit, and therefore should not be protested by the bargaining representative to the Railroad, such passiveness by the bargaining representative constituted a violation of obligations due petitioners by respondents under the Railway Labor Act and the Federal Constitution.

It has been well settled since this Court's decision in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239, and *Order of Railway Conductors* v. *Southern R. Co.*, 339 U.S. 255, that cases involving the interpretation or application of collective bargaining agreements are within the exclusive jurisdiction of the National Railroad Adjustment Board, and that such jurisdiction may not be invaded by either the state or federal courts. We do not understand petitioners to contest this point of law, as such, but they seek to avoid application of the doctrine in this case on the basis of this Court's decisions in *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192, and *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210. The *Steele* case holds that the Railway Labor Act im-

poses on the statutory representative of a craft a duty to represent, *in collective bargaining and in the making of agreements*, all employees in the craft without discrimination because of their race. The *Tunstall* case holds that the federal courts have jurisdiction to entertain a suit for the violation of such duty by the statutory representative of a craft because it is the Federal statute (the Railway Labor Act) which condemns as unlawful such conduct by the representative.

We concede that a collective bargaining representative cannot enter into an agreement with a railroad which is discriminatory with respect to Negroes in its provisions, and that if this occurs the courts have the power to correct the wrong. But, as we have pointed out above in our recitation of the allegations of the complaint, there is no allegation that the collective bargaining agreement involved in this case is discriminatory in its terms or that it was negotiated for a discriminatory purpose. On the contrary, all of the allegations are to the effect that the agreement was *applied* in a discriminatory manner.

This brings us to the crux of the difference between the contention of the petitioners and that of respondents. Petitioners maintain that it makes no difference whether the allegations of racial discrimination concern the negotiation and making of agreements or the application of such agreements. They say that the holding by the Supreme Court in the *Steele* and *Tunstall* cases covers either situation and that the federal courts have jurisdiction to redress the wrong in either event.

We maintain that the *Steele* and *Tunstall* cases do not support petitioners' position and that there are

two Circuit Court decisions which directly support our position. In fact, petitioners concede this to be the case. They take direct issue with the decision of the Court of Appeals for the Fifth Circuit in *Hettenbaugh* v. *Airline Pilots Ass'n International*, 189 F. 2d 319 (1951), and the decision of the Court of Appeals for the Ninth Circuit in *Hayes* v. *Union Pac. R. Co.*, 184 F. 2d 337, *cert. den.* 340 U.S. 942, upon both of which decisions the District Court relied. Petitioners say that these two cases were incorrectly decided and are in conflict with this Court's decisions in the *Steele* and *Tunstall* cases. We contend that the *Hettenbaugh* and *Hayes* cases were correctly decided and that neither decision is incompatible with this Court's decisions in the *Steele* and *Tunstall* cases.

In the *Hayes* case, a group of Negro employees alleged that the collective bargaining representative and the Railroad had violated the Railway Labor Act by administering a collective bargaining agreement so that the Negro employees were discriminatorily denied the promotions and seniority assignments to which they were entitled.[4] The Negro plaintiffs, as here, sought an injunction and other equitable relief, and the defendants moved to dismiss for lack of jurisdiction of the subject matter. In affirming the judgment of the District Court granting defendants' motion to dismiss, the Court of Appeals stated the question raised by the appeal as being whether the District Court has jurisdiction under the Railway Labor Act of an employee's complaint charging racial discrimination in the performance of a collective bar-

[4] For the detailed facts see the District Court's opinion, 88 F. Supp. 108 at 109.

gaining agreement (page 337). In answering this question in the negative, the court said (p. 338):

> "It is not necessary to state in detail the nature of the affidavits and of the pleadings constituting the record which the trial court had before it. These matters are fully set forth in the opinion of Chief Judge Michael J. Roche, the trial judge. D. C., 88 F. Supp. 108. We adopt his opinion. We add to it only to the extent of saying that it is clear to us that the Federal Courts are not charged by federal law with the duty or function of policing the parties in the performance of collective bargaining agreements entered into pursuant to the Railway Labor Act. Congress did not, by the Railway Labor Act, grant jurisdiction to the Federal Courts to afford relief for breaches of performance of collective bargaining agreements. Appropriate tribunals have been established for that purpose. 45 U.S.C.A. § 153; National Railroad Adjustment Board; Slocum v. D.L. & W. R. Co., 339 U.S. 239, 70 S. Ct. 577. It is only when collective bargaining agreements are unlawfully entered into or when the agreements themselves are unlawful in terms or effect that federal courts may act. This is made quite clear by the Supreme Court in Steele v. L. & N. R. Co., 323 U.S. 192; 65 S. Ct. 226, 89 L. Ed. 173 and Tunstall v. Brotherhood, 323 U.S. 210, 65 S. Ct. 235, 89 L. Ed. 187. The disposition of the cause made by the District Court is correct."

It is to be noted that this Court denied certiorari in the *Hayes* case, 340 U.S. 942. Precisely the same contentions are advanced by petitioners here as were advanced to this Court by the petitioners in the *Hayes* case, including the contention that the decision of the Ninth Circuit was in conflict with this Court's decision in the *Steele* and *Tunstall* cases.

The substantive facts in the *Hayes* case are on all fours with the facts in the instant case with the exceptions, first, that here, unlike the *Hayes* case, there is no allegation that the bargaining representative acted "in connivance" with the Railroad in the alleged discriminatory practices by the Railroad; and, second, in the *Hayes* case plaintiff brought suit against the Railroad as well as the bargaining representative. Here the Railroad was not joined as a party defendant, and petitioners seek to make much of this point in their Petition. It seems to us that the short answer to this attempted distinction is that obviously the basic nature of the cause of the action cannot be changed through the tactic of omitting an indispensable party defendant.[5]

The second decision which we believe supports the judgment below is that of the United States Court of Appeals for the Fifth Circuit in *Hattenbaugh* v. *Airline Pilots Ass'n International*, 189 F. 2d 319. That case also involved charges of discriminatory conduct on the part of a bargaining representative, allegedly in violation of the Railway Labor Act. A group of pilots who had been employed during a strike by members of the defendant Association sued the bargaining representative alone to enjoin it from further representing them, for an accounting, and damages. In affirming the District Court's dismissal of the complaint for lack of jurisdiction, the Fifth Circuit said (p. 321):

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[5] Moreover, the District Court in the *Hayes* case, could well have been describing the precise facts here involved when it said (88 F. Supp. 108 at 111):

> "Simply stated, the complaint alleges only that the union has permitted, *through failure to prevent*, the existence of the alleged discriminatory practices of the Railroad."

"There is no allegation here that the bargaining agreement between the parties discriminated against the appellants. At most, there is an allegation of a breach of the bargaining agreement. Any right of action, if one exists, is based on the alleged breach of the bargaining agreement, and does not arise under the Railway Labor Act, but only from the consequent contractual relations of the parties. The federal courts are not charged by federal law with the duty of policing parties in the performance of collective bargaining agreements entered into pursuant to the Railway Labor Act. See Hayes v. Union Pac. R. Co., 9 Cir., 184 F. 2d 337.

"The Congress did not, by the Railway Labor Act, grant jurisdiction to the federal courts to afford relief for breaches of performance of collective bargaining agreements. Appropriate quasi-judicial tribunals have been established for that purpose. Slocum v. Delaware, L. & W. R. Co., 339 U.S. 239, 70 S. Ct., 577, 94 L. Ed. 795. It is only when collective bargaining agreements are unlawfully entered into, or when the agreements themselves are unlawful in terms or effect, that federal courts may act. The question of federal jurisdiction being decisive, it is not necessary to consider the other contentions made by the parties. The dismissal of the cause for want of jurisdiction was correct."

Petitioners advance the further argument that in the *Steele* case this Court found that the Negro petitioners in that case had no adequate remedy before the Railroad Adjustment Board, and they quote from the decision of this Court to the effect that the Adjustment Board "has consistently declined in more than 100 cases to entertain grievance complaints by individual members of a craft represented by a labor

organization". (Pet, p. 6) The answer to such a contention here is that since this Court's admonition in the *Steele* case, the Adjustment Board now entertains grievances by individual members pursuant to the statutory right of the individual to process the grievance in person under Section 3 First (j) of the Railway Labor Act (45 U.S.C., Section 153 First (j)). A number of such cases can be cited which did not exist at the time this Court decided the *Steele* case. We think that if there is any substance to petitioners' claim that they could not pursue their statutory remedy before the Adjustment Board, that the proper time to raise it is after they have tried to do so and failed and not prematurely before the Adjustment Board has had an opportunity to entertain the grievance.

Petitioners further state that the decision in the instant case is in conflict with the decision of the United States Court of Appeals for the Fourth Circuit in *Dillard* v. *Chesapeake & O. Ry. Co.*, 199 F. 2d 948. The *Dillard* decision is the only one, to our knowledge, in which a court has held that it has jurisdiction of a claim by negro employees that they have received discriminatory treatment from a railroad and their collective bargaining representative in the application of a collective bargaining agreement. Unlike the complaint here, the complaint in the *Dillard* case alleged that the bargaining representative actively participated with the railroad in preventing promotion of negro employees. Aside from this factual difference in the allegations of the complaint, however, the Fourth Circuit did state that it was immaterial whether the bargaining representative asserted its power to discriminate against negro employees by

entering into a formal agreement or by improper application of an agreement. In so holding (199 F. 2d 948, 951), it also stated that it had considered the decision of the United States Court of Appeals of the Ninth Circuit in the *Hayes* case but felt that that decision was in conflict with the decision of this Court in *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768.

We believe that the error in the *Dillard* case lies in a misinterpretation of this Court's holding in the *Howard* case. In the latter case the complaint alleged that the bargaining representative had entered into an agreement with a railroad for a discriminatory purpose. No such allegation is to be found in the complaint in the instant case. As we read the opinion in the *Howard* case, this Court held that a bargaining representative who acts by authority of the Railway Labor Act cannot enter into an agreement for a discriminatory purpose even though the employees affected are in a separate class for representation purposes. In reaching this conclusion, this Court carefully distinguished the case it was deciding as one involving the *validity of an agreement*, not the legality of practices under a valid agreement requiring interpretation of its provisions. This is demonstrated by the following language of the Court in the *Howard* decision (343 U.S. 768, 774):

> "Here, as in the *Steele* Case, colored workers must look to a judicial remedy to prevent the sacrifice or obliteration of their rights under the Act. For no administrative remedy can be afforded by the National Railroad Adjustment or Mediation Board. The claims here cannot be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment

> Board under our holding in Slocum v. Delaware, L. & W. R. Co., 339 U.S. 239. *This dispute involves the validity of the contract, not its meaning.* (Italics supplied.)

We do not believe that this holding of *contract invalidity* was applicable to the situation presented in the *Dillard* case, and it is not applicable to the facts alleged by the complaint in the instant proceeding.

II.

ASSUMING, ARGUENDO, THAT THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION, THE JUDGMENT OF DISMISSAL WAS NEVERTHELESS CORRECT BECAUSE THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Assuming for purposes of discussion that the District Court and not the Railroad Adjustment Board had jurisdiction of the subject-matter of the complaint, the judgment of dismissal was correct for reasons urged by respondents but not passed upon by the courts below. Such additional grounds may be urged here, *Langnes* v. *Green*, 282 U.S. 531, 535-539; *Walling* v. *General Industries Co.*, 330 U.S. 545, 547; *United States* v. *Ballard*, 322 U.S. 78, 88.

A. The Allegations of Wrongful Conduct by Respondents Fail to State a Claim Upon Which Relief Can Be Granted

Reduced to its essentials, the allegations of the complaint regarding the refusal of respondents to properly represent petitioners and process their grievance amount to the following:

The Railroad abolished certain jobs held by petitioners. The basis for doing so was that it had leased the docks on which these jobs were performed to its subsidiary, the Transport Company. The Transport

Company then hired its own employees to perform the jobs. Some of the employees hired were those whose jobs had been abolished. The employees affected requested the Brotherhood to handle their grievances against the Railroad. The Brotherhood declined to do so, and thus petitioners claimed that it thereby "breached the statutory duty imposed" upon it by Section 2 Fourth of the Railway Labor Act, 45 U.S.C., Section 152 Fourth, "to protect plaintiffs from any discriminations on the basis of race or color".

The only statutory duty of the bargaining representative with respect to the employment rights of individuals in the craft or class represented relates to the bargaining function—i.e., the area in which the bargaining representative is given statutory authority to negotiate and fix with the Railroad, regardless of the wishes of individual employees, the terms and conditions of employment applicable to all. See *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, and *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332, with respect to the scope of this authority. The basis upon which this Court in the *Steele* and *Tunstall* cases predicated jurisdiction in the federal courts was the "statutory fiduciary duty" of the bargaining representative under the Railway Labor Act to represent in collective bargaining all those for whom it acted without hostile discrimination because of race or color. This obligation is not expressly stated in the Railway Labor Act but was implied by the Court as an essential concomitant of the bargaining representative's exclusive position under the statute and its power to fix the terms of employment of minority members of the craft without their consent. It is thus apparent that in the

Steele and *Tunstall* cases the duty of the statutory representative was predicated on, and co-extensive with, *its authority under the statute*.

There is thus no question of the statutory representative's exclusive authority and obligation with respect to bargaining for rates of pay, rules, and working conditions, but such authority and obligation does not extend to the handling of claims of individuals based upon alleged breaches of agreements which have been negotiated pursuant to the statutory authority. This Court has expressly so held in *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U.S. 711. In that case the Court carefully delineated the scope of the representative's statutory authority under the Railway Labor Act to bind individual employees, and it clearly held that such authority did not extend to the administration of agreements or bind individuals as to their grievances or claims of violations of the agreements, but was limited to the resolution of so-called "major disputes" involving the making of agreements with the carrier. The Court did not hold that the bargaining representative could not represent individuals with respect to their grievances—and in most cases, of course, the bargaining representative does so—but it did hold that the representative had no power to bind the individual with respect to his grievances under the agreement and that the individual had the clear right to resort in person to the Adjustment Board for redress of such grievances.

Consequently, we submit that the "fiduciary duty" concept of the *Steele* and *Tunstall* cases, which was predicated upon the existence of exclusive authority in the bargaining representative to bind the individual employee in contract negotiations with the carrier,

cannot be extended to the field of policing or administering agreements and redressing individual grievances. In short, if the authority to act does not exist, neither does the duty.

It is readily apparent that a requirement that a bargaining representative process all employee grievances would result in a chaotic situation. Should such a theory prevail, the bargaining representative would be in the hopeless position of having to handle to a conclusion, through the grievance machinery and to the Railroad Adjustment Board, each and every claim of the thousands of employees in the craft irrespective of their merit and regardless of their consistency from the point of view of interpretation of the provisions of collective bargaining agreements. The bargaining representative would find itself urging one interpretation to the Board one day and another the next, so that uniform interpretation and application of the agreement would become impossible.

Thus it is clear that there can be no such statutory duty as petitioners assert in their complaint. Accordingly, in the absence of a statutory obligation, any legally enforceable duty of the bargaining representative to process individual grievances would necessarily have to be predicated on a contract. Here no such contract is pleaded. The collective bargaining agreement between respondents and the Railroad does not embrace any such obligation. It is simply an agreement whereby the Railroad makes certain promises to the bargaining representative with respect to the rights and benefits which will be accorded to members of the craft in connection with their employment. It involves no contractual undertaking as between the bargaining representative and the employees.

The Supreme Court of Rhode Island dealt with an issue virtually identical with the one now under discussion in *Cabral* v. *Molders Union*, R.I. , 106 A. 2d 739. In that case the plaintiff brought suit for damages against his collective bargaining representative, alleging as unlawful the union's refusal to process plaintiff's grievance, as a result of which he lost his employment. In sustaining the defendant's demurrer for failure to state a cause of action, the court said (p. 741):

> "In our view the declaration itself does not set out in terms any definite promise, undertaking or agreement by defendant to act for or on behalf of plaintiff or to perform any contractual duty for him in the circumstances alleged. Further, Article VI, Section 1, of the agreement deals only with the procedure to be taken in case of grievances thereunder. Nothing in the section has been brought to our attention which requires the union to act in such matters. Also plaintiff is authorized to deal directly with the employer if he wishes. No agreement, promise, or contract on the part of the union in respect to acting for plaintiff or on his behalf appears to be contained in Article VI as supporting any contractual duty owed to him by defendant.
>
> "The matter of seniority is covered by Article IV, Section 1. No promise, agreement or contractual duty on the part of the union for plaintiff's benefit is provided for in that article. If any difficulty occurs in agreeing on that subject it is to be taken up under the grievance procedure in Article VI hereinbefore referred to. Under Article X the employer agrees that it will not discharge the employee without 'just cause' which is defined in part in that article. Likewise there is no reference in Article X to any promise, under-

taking or contractual duty entered into by the union for plaintiff's benefit.

"It would appear therefore from the declaration itself, which includes and is based on the provisions of the agreement between the employer and the union, that such provisions are largely procedural in nature under which plaintiff as an employee and member of the union acts alone, and that the union has made no promise, undertaking or agreement to act on behalf of plaintiff respecting the matters involved herein. In our opinion therefore there was no error in the ruling of the trial justice sustaining the demurrer."

The same conclusion was reached by the Supreme Court of Alabama in a case involving the same issue between a railroad employee and his bargaining representative. *International Brotherhood of Locomotive Engineers* v. *Couch*, 236 Ala. 611.

For the foregoing reason we respectfully submit that the complaint here fails to state a claim upon which relief can be granted and that, accordingly, the judgment of dismissal below was clearly correct for this additional reason.

B. Judgment of Dismissal Is Also Correct Because the Railroad Is an Indispensable Party Defendant But Was Not Joined by Petitioners

In their complaint petitioners request an interpretation of the bargaining agreement in effect between the Railroad and respondents as requiring notification to petitioners in advance of proposed job abolishments by the Railroad. The complaint further requests a construction by the court of the lease agreement between the Railroad and the Transport Company insofar as that agreement affects their rights as employees.

The collective bargaining agreement in question has been in effect since November 1, 1939. The parties to the agreement are the Railroad and the Brotherhood. The agreement sets forth not only the rights of the employees of the Railroad, but also provides for certain obligations which the employees must meet as a condition of their employment with the Railroad. The allegation of the complaint that petitioners' rights under the agreement have been violated necessarily involves an interpretation of its provisions. This would not only affect the rights of all employees covered by the agreement and respondent Brotherhood, but it would also substantially affect the rights of the Railroad.

Moreover, the rights of the Railroad are very clearly involved in this litigation in connection with its lease agreement with the Transport Company under which the Railroad leases certain portions of its docks at the Houston Freight House. Obviously the Railroad would be seriously affected by any judgment that the Transport Company could or could not hire certain individuals, or declaring that the Railroad could not effectuate its lease agreement with the Transport Company by abolishing positions of persons employed by the Railroad on the leased property.

The rule is well settled in the Federal courts that a court cannot proceed to a final determination of an action in the absence of an indispensable party thereto. *State of Washington* v. *United States*, 87 F. 2d 421, 428 (9th Cir.); *Keegan* v. *Humble Oil & Refining Co.*, 155 F. 2d 971, 973 (5th Cir.); *Nehen* v. *Harwood*, 128 F. 2d 846, 852 (9th Cir.); *Metropolis Theatre Co.* v. *Barkhausen*, 170 F. 2d 481, 485 (7th Cir.).

Both the *State of Washington* and *Metropolis Theatre Co.* cases set forth a detailed test to be applied in all cases in which the issue of an indispensable party is presented to the court. This test, which is generally adopted by the courts, is stated by the United States Court of Appeals for the Ninth Circuit as follows, in the *State of Washington* case (87 F. 2d 421, 427-28):

> "There are many adjudicated cases in which expressions are made with respect to the tests used to determine whether an absent party is a necessary party or an indispensable party. [Citing cases] From these authorities it appears that the absent party must be interested in the controversy. After first determining that such party is interested in the controversy, the court must make a determination of the following questions applied to the particular case: (1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court render justice between the parties before it? (3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party? (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience? * * * * if any one of the four questions is answered in the negative, then the absent party is indispensable."

In applying the foregoing test to the facts in the present case, it clearly appears that questions 3 and 4 must be answered in the negative. If the court were to interpret the collective bargaining agreement as giving petitioners the right to question job abolishment by the Railroad, certainly the rights of a Railroad under the agreement would be seriously affected. Such a determination in the absence of one of the two parties to the agreement could not be said to be consistent with equity and good conscience,

Again, if it were determined by the court that even though the railroad had leased a portion of its docks to the Transport Company for its own operation, the Railroad still could not abolish the jobs of employees performing services on those docks, or that the Transport Company could hire only those individuals who had performed the work for the Railroad with the same seniority rights as they previously enjoyed, obviously such determinations would seriously affect the interests and rights of the Railroad.

Accordingly, it seems clear that in the absence of the Railroad as a party defendant the court could not proceed to a final determination of the rights asserted in the complaint involving the collective bargaining agreement and lease agreement between the Railroad and the Transport Company.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1957

No. 7.

JOHN D. CONLEY, STANLEY MOORE, SR., GEORGE L. CARTER and B. A. WATSON,

Petitioners,

vs.

PAT J. GIBSON, General Chairman of Locals 6051 and 28, RAYMOND DICKERSON, Division Chairman of Locals 6051 and 28, BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, A. F. OF L., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS PAT J. GIBSON, et al.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1957

No. 7

JOHN D. CONLEY, STANLEY MOORE, SR., GEORGE L. CARTER and B. A. WATSON,

Petitioners,

vs.

PAT J. GIBSON, General Chairman of Locals 6051 and 28, RAYMOND DICKERSON, Division Chairman of Locals 6051 and 28, BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, A. F. OF L., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENTS PAT J. GIBSON, et al.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Texas (R. 19-24) is officially reported at 138 F. Supp. 60. The opinion of the United States Court of Appeals for the Fifth Circuit (R. 29a) is reported at 229 F. 2d 436.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 31, 1956 (R. 30). A petition for rehearing filed on February 20, 1956 (R. 30) was denied on March 15, 1956 (R. 31). The jurisdiction of this Court was invoked under Section 1254 (1) of Title 28, United States Code, and a petition for writ of certiorari was granted by the Court on October 8, 1956 (R. 31).

RESTATEMENT OF QUESTIONS PRESENTED

Perhaps the most important single problem of this brief is to correctly state the issues involved. In view of what we regard as a grossly exaggerated statement of the questions presented by Petitioners in their brief to this Court, we are persuaded that precise clarification of the issues presented by the Complaint is of the utmost importance if academic argument is to be avoided upon racial discrimination questions which are here not actually involved. For this reason we trust the Court will indulge us in a more lengthy statement of the issues presented than is usually required.

Petitioners inform this Court that one of the questions presented is whether a Complaint by Negro members of a craft of railway employees states a claim against the bargaining representative for breach of the statutory duty of fair representation imposed upon such representative by the Railway Labor Act when it alleges that "the union *bars them* [the Negro members] *from membership in its local lodge* which carries on the collective bargaining process" (p. 3, italics supplied). Although the Complaint does allege (R. 9-10) that Respondent Brotherhood maintains two separate locals—one composed solely of Negro members (Local 6051) and the other solely of white members (Local 28)—and that plaintiffs have been compelled to join

Local 6051 solely because they are Negroes, there is no allegation that any of Petitioners or those whom they claim to represent have ever been denied the right to admission as a member of Local 28 or have even sought such admission. Moreover, there is also no factual support in the Complaint for the further inference, created by the question presented by Petitioners as above quoted, that the entire bargaining process is conducted by and solely on behalf of the white Local 28.

Petitioners also state that the Brotherhood "uses *its statutory position* to compel them to maintain membership in an inferior, racially segregated local" (p. 3, italics supplied). There is no factual allegation or legal basis for the statement that the Brotherhood maintains separate locals for white and Negro members as a result of or pursuant to any authority granted by statute. For reasons which we shall discuss in the Argument *infra*, the maintenance of segregated locals is not dependent upon or derived from the union shop provisions of the Railway Labor Act nor the union shop agreement made thereunder by the Brotherhood and the Railroad, and in the absence of any allegation that racial segregation is compelled *as a condition of continued employment* the Complaint fails to state a violation of either the statute or the agreement.

Proceeding further with Petitioners' statement of the issues to be determined by this Court, they state that the Complaint alleges that the Brotherhood "refuses to exert *any effort toward maintenance of the collective agreement* insofar as it pertains to the Negro members of the craft, *resulting in their loss of employment and employment rights*" (p. 3, italics supplied). The Complaint contains no such allegation. On the contrary, with the exception of the allegations

concerning the maintenance of segregated locals, it is directed to a specific claim of discriminatory action *by the Railroad* in abolishing certain jobs, which the Complaint does not allege *resulted from any conduct of the Brotherhood* but which it claims the Brotherhood should not have allowed "to transpire" and should have protested on behalf of Petitioners (R. 10-11).

It is clear from the foregoing that the issues which Petitioners seek to have this Court review *are not the issues presented by the Complaint in this case to the courts below.* This is the fallacy of Petitioners' brief to this Court. First, it presented as issues extravagant claims of racial discrimination by Respondents which the factual allegations of the Complaint do not support, and then it addresses itself to these specious issues as though they actually existed. We think a proper statement of the questions presented is as follows:

(1) Whether the allegations of the Complaint that Petitioners have been compelled to accept union membership in a segregated local lodge composed solely of Negroes, unaccompanied by any allegation that this is required as a condition of continued employment, state a violation of the Railway Labor Act;

(2) Whether the exclusive jurisdiction of the National Railroad Adjustment Board under the Railway Labor Act over employee grievances involving the interpretation or application of agreements concerning rates of pay, rules, and working conditions, can be successfully avoided by a litigant simply through the device of not naming the railroad as a party defendant and proceeding solely against the bargaining representative for alleged violation of its statutory duty of fair representation, even though the facts alleged by the Complaint assert wrongful application

of the agreement only by the Railroad, allege no violations of the agreement by the representative, and make only the claim that the representative failed to prevent the alleged discrimination by the Railroad and failed to protest such action as a grievance;

(3) Whether, under such factual allegations, the District Court and the Court of Appeals correctly held that under the Railway Labor Act and decisions of this Court a court lacks jurisdiction to entertain a complaint the *justiciable* facts of which allege racial discrimination by a railroad not in the terms or in the making of a collective bargaining agreement but solely because of its asserted unlawful application to Petitioners;

(4) Assuming, *arguendo*, that the District Court and not the Railroad Adjustment Board had jurisdiction over the subject matter of the Complaint, whether the judgment of dismissal was nevertheless correct because of the failure of the Complaint to state a claim upon which relief can be granted or because of the lack of an indispensable party defendant.

STATUTES INVOLVED

In their brief Petitioners state that Sections 2 Fourth, 2 Eleventh (a), and 3 First (i) of the Railway Labor Act, 45 U. S. C. 152 Fourth, 152 Eleventh (a), and 153 First (i), are particularly involved in the instant case. Respondents fail to see any relevance to any of the issues presented by this case of Section 2 Fourth, which grants to railroad employees the right to bargain collectively through representatives of their own choosing and grants to the majority of any craft or class of employees the right to determine its bargaining representative. The provisions of Section 2 Eleventh (a) and 3 First (i) are admittedly involved in the case, and these provisions of the Railway Labor

Act have been adequately set forth in Petitioners' brief.

RESTATEMENT OF THE CASE

Because in our view, as already demonstrated by our Restatement of the Questions Presented, Petitioners misstate the issues involved in this case by making extravagant claims of racial discrimination by the Brotherhood which the factual allegations of the Complaint do not support, we believe a careful analysis of the allegations of the Complaint is required. We believe, as did both courts below, that such an analysis of the Complaint fails to establish any violation by Respondents of their duty of fair representation admittedly imposed upon them by the Railway Labor Act but, on the contrary—with the single exception of the issue concerning the maintenance by the Brotherhood of racially segregated locals, which we shall show is not a justiciable issue—discloses only an alleged discriminatory application of the bargaining agreement by the Railroad and a lawful declination by the bargaining representative to protest such action to the Railroad and seek redress of Petitioners' alleged grievances.

1. The Complaint

The factual allegations of the Complaint (R. 3-16) may be summarized as follows:

Petitioners (plaintiffs below) are Negro employees of the Texas and New Orleans Railroad Company (herein referred to as the Railroad) and the Southern Pacific Transport Company (herein called the Transport Company), and are members of Local 6051 of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes. Petitioners instituted this suit on their own behalf and allegedly as representatives of other similarly situated

Negro employees of the Railroad and the Transport Company.

Respondents (defendants below) are labor organizations and officers thereof. The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes (herein called the Brotherhood) is a standard international labor organization with its headquarters and principal place of business located at Cincinnati, Ohio, and is the duly selected and legally constituted bargaining representative of certain employees of the Railroad, including Petitioners. Locals 28 and 6051 are affiliated lodges of the Brotherhood whose membership is made up of employees of the Railroad. Pat J. Gibson is General Chairman of the Brotherhood on the Railroad and Raymond Dixon [1] is Division Chairman.

It is alleged that Local 6051 is composed solely of Negro members and Local 28 solely of white members; that Petitioners have been compelled to join Local 6051 solely because of their race and solely for the purpose of affording them representation inferior and different to that offered to members of the white race who are admitted to membership in Local 28; and that although the union shop provisions of the Railway Labor Act and a union shop agreement made by the Brotherhood with the Railroad pursuant to the statute both provide that union membership may not be required of employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other members, the segregation of Negroes into a separate local lodge constitutes a discriminatory denial to them of due process of law (R. 9-11).

---

[1] Through error, Petitioners have designated Mr. Dixon in their Complaint as "Dickerson."

Since November 1, 1939, a collective bargaining agreement, entered into pursuant to the provisions of the Railway Labor Act [45 U. S. C. § 151 *et seq.*], has been in effect between the Railroad and the Brotherhood governing the rates of pay, rules, and working conditions of the employees of the Railroad represented by the Brotherhood (R. 11).

It is alleged that on May 1, 1954, the Railroad posted on the bulletin board at its Houston Freight House (where all the Petitioners were employed) a notice stating that approximately 45 jobs were being abolished. Petitioners believe, but do not allege as a fact, that only those jobs held by Negro employees were abolished. It is claimed that this notification was improper under the terms of the collective bargaining agreement (R. 11). However, the Complaint does not set forth either the terms or substance of the provisions of the agreement alleged to be violated. Indeed, since the Railroad was not made a party defendant, the Complaint is completely vague as to who Petitioners considered was required by the agreement to give proper notice of job abolishments.

The Complaint further alleges that Respondents did not inform Petitioners of the circumstances which caused the notice to be posted. The claim is made in general terms that Respondents "suffered" the abolishment of the jobs "to transpire without in any manner coming to the aid of plaintiffs and those whom they represent; and did decline to hear plaintiffs on this question of discharging repeatedly and without reason" (R. 11). Petitioners admit, however, that Respondents did inform them that the abolishment of the jobs and discharges were due to the leasing by the Railroad to the Transport Company of certain portions of the docks at the Houston Freight House, and

that there was nothing that could be done about it (R. 12).

It is further alleged that the jobs listed as having been abolished were not in fact abolished because persons were immediately hired by the Transport Company to perform them. The claim is made that many white men were hired to fill these jobs and that later on some Negroes, whose jobs had been abolished by the Railroad, were hired but without seniority—Petitioners apparently contending that the seniority rights acquired by the Negro employees of the Railroad should have been credited to them when they were hired by the Transport Company (R. 12).

There are other allegations to the effect that Negro employees of the Railroad have been displaced from permanent positions and placed on a so-called "Break Out" while this has not occurred to white employees, and that Petitioners believe that no white employees represented by the Brotherhood have been displaced. Petitioners aver in their Complaint that the foregoing acts "constituted a planned course of conduct designed to discriminate against them because of their race or color" (R. 12-13).

Declaratory and injunctive relief and damages in the amount of $75,000 are sought for alleged violations of Petitioners' rights under the Federal Constitution, the Railway Labor Act, and the collective bargaining agreement. Discovery by the court is sought of a lease between the Railroad and the Transport Company and the manner in which Petitioners' rights are affected by said lease. Discovery by the court is also sought of the manner in which the collective bargaining agreement between the Railroad and the Brotherhood "has been applied." A declaratory judgment is sought that the maintenance of a separate lodge for Negro members is illegal under the Railway Labor

Act. Injunctions are sought to restrain Respondents from requiring Petitioners to maintain membership in the Brotherhood by joining a segregated Negro lodge, from refusing to bargain for Petitioners on a basis equal to that afforded to the white employees, from refusing to protect Petitioners "from discriminatory action because of race or color from whatever quarter emanating," from permitting or engaging in any discrimination toward Petitioners, from "allowing" Petitioners' jobs to be abolished, from allowing their discharge or termination of their seniority, and from acting as the bargaining representative so long as "any acts of discrimination continue" and until Petitioners are accorded "equality of representation on any phase of labor negotiations" (R. 14-16).

2. Proceedings in and Action by the District Court and the Court of Appeals

As its responsive pleading to the Complaint, Respondents filed in the District Court a motion to dismiss the action (R. 17-18) upon the following grounds:

(1) that the District Court lacked jurisdiction over the subject matter of the Complaint because Congress in the Railway Labor Act has granted to the National Railroad Adjustment Board exclusive jurisdiction of issues involving the application or interpretation of collective bargaining agreements such as those upon which plaintiffs purport to base their claims;

(2) that it appears on the face of the Complaint that there is a defect of an indispensable party defendant because the Texas and New Orleans Railroad, which took the action of abolishing the jobs of which plaintiffs complain and is a party to the bargaining agreement upon which plaintiffs base their rights, has not been joined by plaintiffs;

(3) that the Complaint fails to present a justiciable issue with respect to its allegations concerning the maintenance by the Brotherhood of racially segregated locals; and

(4) that the Complaint fails to state a claim upon which relief can be granted.

On March 16, 1955, the District Court filed a memorandum opinion, 138 F. Supp. 60, in which it held that since the substance of the Complaint was a claim that Petitioners had been denied rights through alleged improper performance of a collective bargaining agreement, the court lacked jurisdiction. It specifically considered and rejected Petitioners' contention that the decisions of this Court in *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, and *Tunstall* v. *Brotherhood*, 323 U. S. 211, were applicable. It further held that because of lack of jurisdiction over the subject matter of the Complaint it was not necessary to discuss the other grounds upon which the Respondents had moved to dismiss (R. 19-24).

On March 21, 1955, the District Court entered its judgment granting defendants' motion to dismiss (R. 24-25), from which judgment Petitioners took an appeal to the United States Court of Appeals for the Fifth Circuit (R. 26).

On January 31, 1956, the United States Court of Appeals affirmed the judgment of the District Court (R. 29a), 229 F. 2d 436. A judgment was entered on January 31, 1956 (R. 30), and a petition for rehearing was denied on March 16, 1956 (R. 31).

SUMMARY OF ARGUMENT

Petitioners claim in this case that the Brotherhood has violated its duty under the Railway Labor Act of fair representation as established and delineated by

this Court in the *Steele*, *Tunstall*, *Graham*, and *Howard* cases, and abused its statutory position and power, and their brief is addressed exclusively to this proposition. Respondents contend that the facts alleged in the Complaint of misconduct by the Brotherhood do not support this claim as a matter of law, and that the dismissal of the action by the courts below should be affirmed.

In our view, the issues as framed by Petitioners are misstated in many respects and cannot be supported by the factual allegations of the Complaint. In substance these issues, as well as the prayers for relief set forth in the Complaint, seek determination by this Court of abstract questions of racial discrimination.

The factual allegations of the Complaint actually boil down to two separate and unrelated claims: (1) that the Brotherhood is violating the Railway Labor Act, and specifically the union shop provisions thereof, by its maintenance of separate locals which are segregated as between Negro and white members; and (2) that the Brotherhood's failure to prevent, protest, or redress certain alleged discriminatory action by the Railroad in abolishing a number of jobs previously held by Petitioners and curtailing their seniority rights constitutes a breach of the bargaining representative's duty under the Railway Labor Act to represent all members of the craft fairly and without discrimination because of race or color.

1. Our contention in opposition to Petitioners' first claim concerning the maintenance of racially segregated locals is that in the absence of any alleged deprivation of employment such action by the Brotherhood does not violate the Railway Labor Act and fails to present a justiciable issue. The legislative history of the Union Shop Amendment to the Railway Labor

Act clearly supports our contention. Congress was specifically requested to provide that a union which segregates members into separate locals is not entitled to any of the benefits of the statute. It expressly refused to do so and restricted the protection afforded under the union shop provisions to protection of the employe's job. Moreover, in deciding the *Steele* case, this Court recognized that the Railway Labor Act does not deny to a labor organization "the right to determine eligibility to its membership." In its consideration of the proposed Union Shop Amendment to the Railway Labor Act, Congress was also asked to provide that any union shop agreement entered into by a labor organization which denied membership to Negroes would be unlawful. Congress also refused to make this requirement. Further, the claim made in Petitioners' brief that solely because of their race the union "bars" Petitioners from membership in the white local is completely unsupported by any factual allegations in the Complaint. There is no allegation that any of Petitioners have been denied admission to the white local or that any of them have ever sought to obtain admission as members therein.

2. Petitioners' second claim that Respondents were obligated by the fair representation requirements of the Railway Labor Act to either prevent the Railroad from abolishing certain of Petitioners' jobs or to protest and redress such action is untenable as a matter of law. In substance, the factual allegations of the Complaint, which are unfairly described by Petitioners as a planned course of conduct designed to discriminate against Petitioners because of their race or color, are limited to action exclusively by the Railroad in abolishing certain of Petitioners' jobs and curtailing their seniority rights, in none of which the Brotherhood is alleged to have participated, agreed to,

assisted in, conspired for, known about, or done anything more than "suffered" such action by the Railroad "to transpire" and "did not come to the aid" of Petitioners after the Railroad had acted. We do not think that such conduct or omission by the Brotherhood constitutes either hostile discrimination because of race or color or an abuse of its statutory authority and power as claimed by Petitioners.

Specifically, the doctrine of the *Steele*, *Tunstall*, *Graham*, and *Howard* decisions of this Court predicated jurisdiction in the federal courts to redress discrimination by a bargaining representative under the Railway Labor Act in the making of agreements upon the exclusive authority and power of such representative under the statute to fix the terms of such agreements for all members of the craft without their consent. But such exclusive authority does not extend to the handling of claims of individuals based upon alleged breaches of agreements which have been negotiated pursuant to the statutory authority. This Court has expressly so held in *Elgin, Joliet & Eastern R. Co.* v. *Burley*, 325 U. S. 711, aff'd on reargument, 327 U. S. 661. Although the bargaining representative may represent individuals with respect to their grievances if they are found to have merit, it is not required to do so since it cannot, without the individual's consent, bind him, and the individual further has the clear right under the statute to resort in person to the Adjustment Board for the redress of such grievances.

3. The lower courts were correct in holding that Petitioners' claims concerning job abolishments and curtailment of seniority were in substance, though not in form, grievances within the exclusive jurisdiction of the National Railroad Adjustment Board. Whether or not Petitioners' claims amount to a violation of their rights under the collective bargaining agreement

as asserted in the Complaint, obviously requires interpretation of the bargaining agreement. In fact, Petitioners specifically request such construction in their Complaint and also ask for construction of the lease-agreement between the Railroad and the Transport Company insofar as that agreement affects their rights as employees. Aside from the fact that the Railroad is clearly an indispensable party defendant to any such determination, the courts below correctly held that such determinations were within the exclusive jurisdiction of the National Railroad Adjustment Board.

We view as untenable Petitioners' conclusion that the specific factual grievances of the complaint could be "adjudicated without in any manner considering whether or not there was in fact a breach of the collective bargaining agreement by the carrier." If such a contention were true, it would necessarily mean that the District Court could find the Brotherhood guilty of a breach of its statutory duty to represent fairly without first determining whether the action of the Railroad, which Petitioners assert the Brotherhood should have prevented and protested, was a violation of the collective bargaining agreement. Moreover, such a conclusion of Petitioners clearly demonstrates that their objective here is to obtain a holding that a bargaining representative must process on behalf of Negro employees any grievance regardless of its merits. The holdings of the courts below are completely compatible with the conclusions of the United States Court of Appeals for the Ninth Circuit in *Hayes* v. *Union Pacific R. Co.*, 184 F. 2d 337, wherein it was held that the District Court correctly dismissed as outside its jurisdiction a complaint against both the railroad and the bargaining representative seeking redress for breaches of a collective bargaining agreement upon facts substantially identical

with those here involved. With specific reference to the claim against the bargaining representative, the court held that the only claim against it amounted to a charge of "failure to prevent" alleged discriminatory practices of the railroad. This Court denied certiorari in the *Hayes* case, 340 U. S. 942.

For the above reasons, Petitioners' claims amount either to a failure to state a cause of action against Respondents or they constitute grievances which are within the exclusive jurisdiction of the Railroad Adjustment Board.

ARGUMENT

Although Petitioners' brief argues that the Complaint states a cause of action against the Brotherhood for violation of its duty under the Railway Labor Act of fair representation as established and delineated by this Court in the *Steele, Tunstall, Graham,* and *Howard* cases,[2] and abuse of its statutory position and power, we contend that the *facts* alleged in the Complaint of misconduct *by the Brotherhood* do not support this claim as a matter of law.

We wish to protest and prevent if we can any use of this case as a vehicle for abstract determination of a series of racial discrimination issues which we respectfully submit are not presented on this record. This Court has repeatedly advised litigants that it will not judicially determine abstract questions or grant declaratory or injunctive relief upon a hypothetical set of facts framed for the purpose of invoking the advice of the Court without a real case between the parties having adverse legal interests of certainty and immediacy. *Liberty Warehouse Co.* v. *Grannis,* 273 U. S.

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[2] *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192 (1944); *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210 (1944); *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, 330 U. S. 232 (1949); *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U. S. 768 (1953).

70; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288; *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270; *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, *reh. den.* 300 U. S. 68[illegible]; *Coffman* v. *Breeze Corporations*, 323 U. S. 316, 318, 323-324; *United Public Workers* v. *Mitchell*, 330 U. S. 75, 88-89. We believe that Petitioners' brief flies in the face of this well-established doctrine by seeking to have the Court rule on a series of abstract racial discrimination issues which actually have no support in the factual allegations of the Complaint insofar as the Brotherhood's conduct is concerned. In part this has been accomplished through misstatement of the issues involved and through an exaggeration of certain of the facts alleged in the Complaint as we have already shown in our Restatement of the Questions Presented *supra*. In part it has been accomplished by the sweeping and abstract character of the prayers for relief set forth in the Complaint as distinguished from the actual conduct of the Brotherhood as it is factually related.

It can be argued that the prayers for relief, or the issues as framed by Petitioners in their brief, state a cause of action cognizable by the District Court if the allegations of the Complaint *factually* establish that the Brotherhood has done the things or been guilty of the conduct sought to be enjoined. But that is not the case. For example, Petitioners seek an injunction against any further bargaining by Respondents on their behalf until they are accorded equality of representation "on any phase of labor negotiations" (R. 16). If there were some specific allegation in the Complaint that Respondents had discriminated against Petitioners in the conduct of labor negotiations in a particular situation, unquestionably this would be subject to remedy by injunction under the doctrine of the *Steele* case. But the Com-

plaint contains not a single allegation that the collective bargaining agreement between the Railroad and the Brotherhood is discriminatory or illegal in any of its provisions or that it was illegally entered into by the Brotherhood or the Railroad, and this fact appears to be conceded in Petitioners' brief to this Court.

The prayers for relief also seek to enjoin Respondents from "permitting" any discrimination toward Petitioners "from whatever quarter emanating," from "allowing" their jobs to be abolished, and from allowing their seniority to be terminated on account of race or color (R. 15). Clearly, in the absence of allegations that the Brotherhood has participated in such acts of discrimination, or conspired with someone to bring them about, or acceded to its perpetration upon Petitioners, the relief sought against the Brotherhood is not warranted. Nowhere in the Complaint is it alleged that Respondents conspired or participated in any discussions with the Railroad regarding the abolishment of the 45 jobs Petitioners allege they have lost, or that Respondents in fact took any action in the alleged deprivation of Petitioners' rights under the bargaining agreement. The only specific acts alleged to have been committed by Respondents are that they did not prevent the jobs from being abolished or protest their abolishment to the carrier.

In short, with the single exception of the allegations of the Complaint concerning the maintenance of a separate Negro lodge by the Brotherhood—which we shall shortly show fails to state a justiciable issue—the only acts of discrimination alleged by the Complaint appear to be on the part of the Railroad, and the remedy by way of declaratory judgment and injunction should have been sought against it. In the absence of some factual allegations of involvement by the Brotherhood in the discrimination of which Peti-

tioners complain, we do not believe that it can lawfully be required to prevent such conduct by others. Although their duty of fair representation certainly includes the obligation to act in good faith for all members of the craft which they represent, whether they be white or colored, we do not believe the Railway Labor Act or the Constitution exact the obligation for which Petitioners contend in this case. Specifically, we do not believe that the Railway Labor Act requires a labor organization to redress grievances of individual employees which it may conclude are lacking in substance or merit either with the carrier or before the Railroad Adjustment Board for the reason that the Railway Labor Act expressly gives this right to the individual himself in the event his bargaining representative either declines to act on his behalf or is not authorized to do so. This proposition will be discussed in more detail *infra*.

We shall first discuss the allegations of the Complaint that the maintenance by the Brotherhood of racially segregated locals is a violation of the Railway Labor Act and should be so declared and enjoined.

I

IN THE ABSENCE OF ANY ALLEGED DEPRIVATION OF EMPLOYMENT, THE MAINTENANCE BY THE BROTHERHOOD OF RACIALLY SEGREGATED LOCALS DOES NOT VIOLATE THE RAILWAY LABOR ACT AND FAILS TO PRESENT A JUSTICIABLE ISSUE.

One example of Petitioners' efforts to obtain an abstract determination by this Court is afforded by their allegations concerning the maintenance by the Brotherhood of racially segregated locals. Insofar as the *factual* allegations of the Complaint are concerned, they state that the Brotherhood maintains two separate locals for various purposes of collective bargaining for employees who work at the Houston Freight House of the Railroad; that Local 6051 is composed

solely of Negro members and Local 28 is composed solely of white members; and that Petitioners have been compelled to join Local 6051 solely because of their race and for the purpose of affording them inferior and different representation than that afforded to the white members of Local 28 (R. 9-10).

These are all the factual allegations of the Complaint relating to the racially segregated locals. In order to properly present to the Court the issue of law which such factual allegations raise, we believe the differences should be noted between these facts concerning the Brotherhood's conduct as they are alleged and the way in which they are expanded by Petitioners to frame the issue which they assert is raised, and also the manner in which Petitioners' prayers for relief on the segregation issue go beyond the facts alleged.

As to the framing of the issue, Petitioners state in their brief to this Court that the Complaint alleges that "solely because of their race, the union bars them from membership in its local lodge which carries on the collective bargaining process," and "uses its statutory position to compel them to maintain membership in an inferior, racially segregated local" (Pet. Br., p. 3).

As we have already noted in our Restatement of the Questions Presented *supra*, there is no allegation in the Complaint which supports the statement in the Petitioners' brief that the "union bars them from membership" in local 28, nor any factual allegation that it has used "its statutory position to compel them to maintain membership" in Local 6501. There is no allegation in the Complaint that any of the Petitioners have been denied admission to Local 28 or that any of them have ever sought to obtain admission as members therein. Nor is there any claim made in the Com-

plaint that the Brotherhood has deprived any of the Petitioners of employment or attempted to make their membership in a segregated local a condition of continued employment, without which action there is no justification for the claim that the Brotherhood's maintenance of separate locals is pursuant to or dependent upon its statutory authority.

Similarly, the prayer for declaratory judgment by Petitioners in the Complaint (pp. 5-6) seeks to improperly relate the maintenance of separate locals to the union shop provisions of the Railway Labor Act by requesting determination of whether Petitioners "can lawfully, under the terms of the union shop contract of March 1, 1952, which provides for compulsory union membership, be compelled to accept membership in said union on terms different from that which is applicable to persons or employees of the white race of the same class" (R. 5-6). The prayers for relief also request that a declaratory judgment be granted holding that "the segregation of Negro employees of the craft represented by the Brotherhood into a separate local is illegal under the National Relations Act [sic][3] and is contrary to the Union Shop Agreement of March 1, 1953," and further seek an injunction enjoining the Brotherhood from "requiring plaintiffs to maintain membership in the union by joining Local 6051 the segregated local" (R. 15).

As we shall show, in the absence of any factual allegations that the Brotherhood has deprived any of Petitioners of employment for failure to join the segregated local or compelled them to maintain membership in such local *as a condition of continued employment*, these prayers for relief involving the statute

[3] Petitioners clearly mean the Railway Labor Act and not the National Labor Relations Act which, of course, is inapplicable to railroad employees.

present an abstract issue for determination by the Court which is not justiciable.

We urged in the courts below that the allegations of the Complaint concerning the issue of racially segregated locals failed to present a justiciable issue. We make the same contention here. In support of this contention we wish to emphasize first, that quite apart from the requirements of any provisions of law, or specifically the Union Shop Amendment to the Railway Labor Act, and dealing solely with the issue of whether segregation is in fact compelled as asserted by Petitioners, we repeat that there is no allegation that any of Petitioners have been denied membership in Local 28 or that any of them have sought such membership. Second, we submit that the Railway Labor Act does not prohibit the maintenance of racially segregated locals by a union organization. In fact, the Railway Labor Act does not prohibit total exclusion from membership of Negroes by railroad unions. Third, we submit, contrary to the argument advanced by Petitioners in their brief (pp. 10-11), that the legislative history of the Union Shop Amendment to the Railway Labor Act plainly discloses that its restrictions and conditions were directed solely to deprivation of employment and that an effort to have them extended to prevention of segregated locals was expressly rejected by Congress.

In the case of *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, this Court recognized that the Railway Labor Act does not deny to a labor organization "the right to determine eligibility to its membership" (p. 204). The union involved in the *Steele* case, by its Constitution and Ritual, excluded all Negroes from membership (p. 194). While that is not the situation in the instant case, and the Brotherhood of Railway and Steamship Clerks by its Constitution does admit

to membership both white and Negro, it follows from the quoted statement in the *Steele* case that maintenance of seperate locals for white and Negro does not violate the Railway Labor Act.

When the Union Shop Amendment to the Railway Labor Act was before Congress, it made no change in the law as declared by this Court in the *Steele* case.

Congress was expressly requested to provide that a union *which segregates members into separate locals*, or excludes any member of a craft from membership on the grounds of race, creed, or color, is not entitled to act as representative of the craft under the Railway Labor Act and is not entitled to any of the benefits of the statute.[4] Congress was also asked to provide that any union shop agreement entered into by a labor organization which denied membership on the basis of race, color, or creed would be unlawful.[5] Congress saw fit not to do so. Instead, it restricted the protection afforded under the amendment to protection of employees' jobs.

The report of the House Committee considering the union shop bill, H. R. Rep. No. 2811, 81st Cong., 2d Sess. (1950), states (p. 5):

> "The statutes of some labor organizations subject to the Railway Labor Act establish qualifications for membership which cannot be met by some employees, or provide for denial of, or expulsion from, membership on grounds other than failure to tender periodic dues, initiation fees, and assessments. The proviso clauses in paragraph

[4] Hearings before House Committee on Interstate and Foreign Commerce on H. R. 7789, 81st Cong., 2d Sess. (1950), pp. 294-295, 285-286; Hearings before Senate Sub-committee of the Committee on Labor and Public Welfare on S. 3295, 81st Cong., 2d Sess. (1950), pp. 301-302, 244-245.

[5] House Hearings, p. 274; Senate Hearings, p. 237.

eleventh (a) are designed to protect such employees. Thus, if an employee is denied membership, or is eligible for membership only on terms and conditions not generally applicable to other members, *he cannot be required to relinquish his job because of his failure to join a labor organization.*" (Italics supplied).

Similarly, the report of the Senate Committee, Sen. Rep. No. 2262, 81st Cong., 2d Sess. (1950), states (pp. 3-4):

"During the course of the hearings before the subcommittee evidence was introduced showing that the constitutions of some labor organizations established qualifications for membership which cannot be met by some railroad employees. The proposal was made by Senator Lehman that your committee's intention be made clear that *such employees were not to be deprived of their employment* as a result of the exercise of the right extended by this bill. Your committee desires to make it clear that the proviso clauses in paragraph eleventh (a) are designed to protect such employees; thus if an employee is denied membership *or is eligible for membership only on terms and conditions not generally applicable to other members, he cannot be requested to give up his job because of his failure to join a labor organization.* Furthermore, if membership is denied or if an employee is expelled from membership for any reason other than his failure to tender the uniformly required periodic dues, initiation fees, and assessments, *he cannot be required to relinquish his job because of his failure to join or remain a member of a labor organization.* Your committee also desires to make it clear that nothing in this bill is intended to modify in any way the requirement that the authorized bargaining representative shall represent all the employees in the craft or class, including nonunion employees as well as members of the union, fairly, equitably, and in good faith. See Steele v. Louisville & Nashville

Railroad Co., 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173, and Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187." (Italics supplied.)

Accordingly, the question of whether the Railway Labor Act precludes respondents from requiring Petitioners to join a racially segregated local is not properly before this Court as a justiciable issue unless the terms of the union shop agreement entered into between the Brotherhood and the Railroad provide for termination of Petitioners' employment for reasons other than those expressly allowed by Congress, or the agreement is sought to be applied so as to result in such termination. It is undisputed that the union shop agreement entered into by the Brotherhood and the Railroad contains no provision in violation of Petitioners' rights under the statute. In fact, the limitations on the requirement of union membership which are contained in the agreement are virtually in the language of the Union Shop Amendment to the Railway Labor Act. This is conceded in paragraph VII of the Complaint which quotes the applicable language in both the union shop agreement and the statute (R. 10). Section 4 of the union shop agreement provides in pertinent part as follows:

> "Nothing in this agreement shall require an employee to become or to remain a member of the organization if such membership is not available to such employee upon the same terms and condition as are generally applicable to any other member . . ." (R. 10).

Consequently, since the Complaint contains no allegations whatever of any action taken by Respondents to terminate employment of any of Petitioners, and since the action of the Brotherhood in the maintenance of racially segregated lodges or locals, apart from any

effort to make such membership a condition of continued employment, does not constitute a violation of law, the issue presented by Petitioners is not justiciable. See *Taylor v. Brotherhood of Ry. & Steamship Clerks, etc.*, 106 F. Supp. 438 (D. C. Dist. of Col., 1952).

II

THE ALLEGATIONS OF THE COMPLAINT CONCERNING ABOLISHMENT BY THE RAILROAD OF CERTAIN OF PETITIONERS' JOBS AND THE FAILURE OF RESPONDENTS TO PREVENT OR PROTEST SUCH ACTION DO NOT CONSTITUTE A VIOLATION OF THE BAGAINING REPRESENTATIVE'S STATUTORY DUTY OF FAIR REPRESENTATION.

Apart from the allegations of Petitioners' Complaint concerning the maintenance by Respondents of racially segregated lodges, the remaining factual allegations of the Complaint boil down to a claim that Respondents were obligated by law to either prevent the Railroad from abolishing certain of Petitioners' jobs or to protest such action once it was accomplished. The factual allegations of the Complaint are completely vague as to what provisions of, or in what manner, the bargaining agreement was violated by the Railroad when it abolished the particular jobs in question, and equally vague as to how Respondents could have prevented such action by the Railroad or successfully protested it. Petitioners presumably are contending that because Respondents did neither of these things they abused their statutory authority as representative of the craft including Petitioners and failed in their obligation to represent them fairly. We submit that when the claimed breach by the Brotherhood of its statutory duty of fair representation is limited to the factual allegations of the *Brotherhood's conduct* —as it must be to state a justiciable controversy—Petitioners' contention fails to state a claim against Respondents upon which relief can be granted.

In this connection, it deserves to be noted at the outset of this discussion that whatever may be claimed as

to Respondents' statutory obligation with respect to the job abolishments by the Railroad, there is certainly no warrant nor any supporting factual allegations for Petitioners' contentions in their brief to this Court that such omission by the Brotherhood "constituted a planned course of conduct designed to discriminate against Petitioners and those similarly situated solely because of their race or color" (Pet. Br., p. 5), or for the statement that the Brotherhood "refuses to exert any effort toward maintenance of the collective agreement insofar as it pertains to the Negro members of the craft" (p. 3), or for the statement that the alleged failure of the Brotherhood to act, rather than the action of the Railroad, "resulted in" Petitioners' "loss of employment and employment rights" (*ibid*). In contrast to the sweep of these statements, which certainly infers a continuing course of discriminatory conduct and a series of deliberate acts by Respondents to deprive Petitioners of any representation or benefits under the collective bargaining agreement, the *facts* in the Complaint are directed to a very specific grievance. There are no factual allegations that it ever happened before, or that it happened pursuant to an agreement between the Railroad and Respondents, or that in similar circumstances the jobs of white employees were protected while those of Negroes were not, or that apart from this single alleged violation of the agreement by the Railroad any other benefits of the bargaining agreement have been denied to Petitioners.

Reduced to its essentials, as shown in detail by our analysis of the allegations of the Complaint, *supra*, pp. 6-10, Petitioners' claim amounts to the following: The Railroad abolished approximately 45 jobs held by Petitioners. The basis for doing so was that it had leased the docks on which these jobs were performed to the Southern Pacific Transport Company, alleged

by Petitioners to be the Railroad's wholly owned subsidiary. The Transport Company then hired its own employees to perform the jobs. Some of the employees hired were those whose jobs had been abolished, including some of the Petitioners but without seniority. Petitioners had no previous notification from the Railroad, which they allege was required under the collective bargaining agreement, of the job abolishment until the Railroad posted a notice stating that approximately 45 jobs were being abolished. Respondents allowed these discharges "to transpire" and "did not come to the aid" of Petitioners (R. 11). Although it is also alleged that Respondents declined to hear Petitioners on the question of these discharges and did not attempt to apprise them of the reason why they had occurred, it is admitted in the Complaint that Respondents did inform Petitioners "that the said abolishing of jobs and discharging was due to the leasing of certain portions of the docks at the Houston Freight House by the T. & NO. Railroad Company to the Southern Pacific Transport Company and that there was nothing that could be done" (R. 11-12).

This is the sum total of the Brotherhood's action which the Complaint concludes constituted a planned course of conduct designed to discriminate against them because of their race or color and which Petitioners assert is an unlawful abuse of statutory position and power by the Brotherhood and a breach of its duty of fair representation under the Railway Labor Act. In support of this position, Petitioners principally rely upon this Court's decisions in the *Steele*, *Tunstall*, *Graham*, and *Howard* cases.[6]

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[6] *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192 (1944); *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210 (1944); *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, 330 U. S. 232 (1949); *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U. S. 768 (1953).

We submit that the basis upon which this Court in these cases predicated jurisdiction in the federal courts was the statutory fiduciary duty of the bargaining representative under the Railway Labor Act to represent in collective bargaining all those for whom it acted without hostile discrimination because of race or color. This obligation is not expressly stated in the Railway Labor Act but was implied by the Court as an essential concomitant of the bargaining representative's exclusive position and power under the statute to fix the terms of employment of minority members of the craft without their consent. Accordingly, we think the conclusion is justified that in all of these cases this court has held that the duty of the bargaining representative was predicated on, and co-extensive with, *its exclusive authority under the statute*.

There is thus no question of the statutory representative's exclusive authority and obligation with respect to bargaining for rates of pay, rules, and working conditions, but *such exclusive authority* does not extend to the handling of claims of individuals based upon alleged breaches of agreements which have been negotiated pursuant to the statutory authority. This Court has expressly so held in *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711, aff'd on reargument, 327 U. S. 661. In that case the Court carefully delineated the scope of the representative's statutory authority under the Railway Labor Act to bind individual employees, and it clearly held that such authority did not extend to the administration of agreements or bind individuals as to their grievances or claims of violations of the agreements, but was limited to the resolution of so-called "major disputes" involving the making of agreements with the carrier. The Court did not hold that the bargaining representative could not represent individuals with respect to their grievances—and in most cases, of course, the bar-

gaining representative does so—but it did hold that the representative had no statutory power to bind the individual with respect to his grievances under the agreement and that the individual had the clear right to resort in person to the Adjustment Board for redress of such grievances.

Consequently, we submit that the "fiduciary duty" concept of the *Steele* and *Tunstall* cases, which was predicated upon the existence of exclusive authority in the bargaining representative to bind the individual employee in contract negotiations with the carrier, cannot be extended to the field of policing or administering agreements and redressing individual grievances. In short, if the exclusive authority to act does not exist, neither does the obligation.

It is not necessary for us to take issue with the position repeatedly urged by Petitioners in their brief to this Court that the duty imposed upon the bargaining representative by the Railway Labor Act is not limited to the making of a contract but is co-extensive with the total authority and power given the representative by the statute (Pet. Br., pp. 7, 10, 11, 12, 14). Like so many of Petitioners' prayers for relief, as previously demonstrated, and like so many of the contentions in their brief, the proposition is an academic one which seeks determination of an abstract issue of law unless and until it is related to a specific factual situation. Such a specific factual demonstration of abuse of statutory power and authority is clearly spelled out in the *Steele*, *Tunstall*, *Graham*, *Howard*, and other Negro discrimination cases upon which Peti-

tioners rely. In all these cases the conduct of the bargaining representative was clearly marked as depriving Negro employees of the benefits which were extended to white employees solely because of race or color.

But what is the situation here? Insofar as the factual allegations of the Complaint inform us, there was no agreement made by the Brotherhood with the Railroad to abolish jobs of Negro employees, or to discriminate in rehiring with respect to seniority rights, or to bring about displacement of Negro employees from permanent jobs, or to compel Negroes hired by the Transport Company to join another union. There is no claim that the Brotherhood conspired with the Railroad to bring about such a result. There is no charge that the bargaining representative suggested any of the action that the Railroad took, that it had any participation in it, or that it was even consulted by the Railroad (R. 11-13).

Consequently, *what specific conduct by the Brotherhood* discriminated against Petitioners in favor of white employees and thus constituted a breach of its statutory duty of fair representation? Petitioners claim that the Brotherhood "abnegated" its statutory duty by "refusing to represent them [Petitioners] within the collective bargaining process" (Pet. Br., p. 12). But this generalized conclusion in the specific factual setting here involved necessarily means that the Brotherhood is required to assert to the Railroad that its action of job abolishment was illegal under the collective bargaining agreement regardless of what the Brotherhood thinks of the merits of such a claim. It

further presupposes that if such a protest is unsuccessful with the Railroad, the Brotherhood must carry the matter further, presumably as a grievance to the National Railroad Adjustment Board. Obviously this is the only representation which the Brotherhood could possibly undertake in connection with actions by the Railroad of which complaint is made in the instant case.

Accordingly, the principle of law which Petitioners are asking this Court to declare is that if at any time a railroad dismisses Negro employees and these employees claim that such dismissals were motivated solely because of their race or color, the bargaining representative must protest the action and process it as a grievance before the Adjustment Board whether or not it agrees that the carrier's action violates the collective bargaining agreement. We do not believe that the duty of fair representation under the Railway Labor Act imposes such an obligation.

It is readily apparent that a requirement that a bargaining representative process all employee grievances would result in a chaotic situation. Should such a theory prevail, the bargaining representative would be in the hopeless position of having to handle to a conclusion, through the grievance machinery and to the Railroad Adjustment Board, each and every claim of the thousands of employees in the craft irrespective of their merit and regardless of their consistency from the point of view of interpretation of the provisions of collective bargaining agreements. The bargaining representative would find itself urging one interpretation to the Board one day and another the next, so that uniform interpretation and application of the agreement would become impossible.

The Supreme Court of Rhode Island dealt with an issue virtually identical with the one now under dis-

cussion in *Cabral* v. *Molders Union*, 82 R. I. 178, 106 A. 2d 739. In that case the plaintiff brought suit for damages against his collective bargaining representative, alleging as unlawful the union's refusal to process plaintiff's grievance, as a result of which he lost his employment. In sustaining the defendant's demurrer for failure to state a cause of action, the court said (p. 741):

> "In our view the declaration itself does not set out in terms any definite promise, undertaking or agreement by defendant to act for or on behalf of plaintiff or to perform any contractual duty for him in the circumstances alleged. Further, Article VI, Section 1, of the agreement deals only with the procedure to be taken in case of grievances thereunder. Nothing in the section has been brought to our attention which requires the union to act in such matters. Also plaintiff is authorized to deal directly with the employer if he wishes. No agreement, promise, or contract on the part of the union in respect to acting for plaintiff or on his behalf appears to be contained in Article VI as supporting any contractual duty owed to him by defendant.
>
> "The matter of seniority is covered by Article IV, Section 1. No promise, agreement or contractual duty on the part of the union for plaintiff's benefit is provided for in that article. If any difficulty occurs in agreeing on that subject it is to be taken up under the grievance procedure in Article VI hereinbefore referred to. Under Article X the employer agrees that it will not discharge the employee without 'just cause' which is defined in part in that article. Likewise there is no reference in Article X to any promise, undertaking or contractual duty entered into by the union for plaintiff's benefit.
>
> "It would appear therefore from the declaration itself, which includes and is based on the provisions of the agreement between the employer

and the union, that such provisions are largely procedural in nature under which plaintiff as an employee and member of the union acts alone, and that the union has made no promise, undertaking or agreement to act on behalf of plaintiff respecting the matters involved herein. In our opinion therefore there was no error in the ruling of the trial justice sustaining the demurrer."

For the foregoing reasons, we submit that Petitioners have failed to establish that the Brotherhood's failure to prevent, protest, or seek redress of the alleged discriminatory action of the Railroad constitutes abuse of Respondents' statutory authority or a breach of its duty of fair representation, and thus the Complaint fails to state a claim against Respondents for which relief may be granted.

III

THE HOLDINGS OF THE LOWER COURTS ARE CORRECT THAT PETITIONERS' CLAIMS CONCERNING JOB ABOLISHMENTS AND CURTAILMENT OF SENIORITY WERE IN SUBSTANCE, THOUGH NOT IN FORM, GRIEVANCES WITHIN THE EXCLUSIVE JURISDICTON OF THE NATIONAL RAILROAD ADJUSTMENT BOARD.

The courts below regarded the Complaint as in substance one necessarily involving the interpretation or application of the collective bargaining agreement in effect between the Railroad and the Brotherhood, and as one which, though not in form, in fact really presented a dispute between the Railroad and the Petitioners. Reference to the allegations of the Complaint clearly substantiates such a conclusion.

The collective bargaining agreement in question has been in effect since November 1, 1939. The parties to the agreement are the Railroad and the Brotherhood. The allegations of the Complaint that Petitioners' rights under this agreement have been violated necessarily involves an interpretation of its provisions. This would not only affect the rights of all employees

covered by the agreement and Respondent Brotherhood but it would also substantially affect the rights of the Railroad.

As a matter of fact, Petitioners request in their Complaint an interpretation of the bargaining agreement in effect between the Railroad and Respondents as requiring notification to Petitioners in advance of proposed job abolishments by the Railroad (R. 11, 14-15). The Complaint also requests a construction by the Court of the lease agreement between the Railroad and the Transport Company insofar as that agreement affects their rights as employees (R. 14). Obviously, any judgment which Petitioners could obtain in this case would have to proceed upon a construction of both the provisions of the bargaining agreement and the lease in order to determine whether the Transport Company could or could not hire certain individuals and whether the Railroad could or could not effectuate its lease agreement with the Transport Company by abolishing positions of persons employed by the Railroad on the leased property.[7]

The courts below properly concluded, we believe, that these determinations were not theirs to make, but were within the exclusive jurisdiction of the Railroad Adjustment Board. It has been well settled since this Court's decision in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, and *Order of Railway Conductors* v. *Southern R. Co.*, 339 U. S. 255, that cases involving the interpretation or application of collective bargaining agreements are within the exclusive jurisdiction of the National Railroad Adjustment Board, and that such jurisdiction may not be invaded by either the state or federal courts. We do not understand Petitioners to

[7] For these reasons, Respondents included as one ground of their motion to dismiss the failure to name the Railroad an indispensable party defendant to the action.

contest this point of law, as such, but they seek to avoid application of the doctrine in this case on the ground that the only issue here sought to be determined is "whether there was a breach by the Brotherhood of the statutory duties imposed upon it to represent all members of the craft fairly and to refrain from using its statutory position and power to discriminate against Negro members of the craft" (Pet. Br., p. 14).

We cannot agree with Petitioners' conclusion that the specific factual grievances of which they complain could "be adjudicated without in any manner considering whether there was or was not, in fact, a breach of the collective bargaining agreement by the carrier" (Pet. Br., p. 14). To do so would not only ignore large portions of Petitioners' prayers for discovery, declaratory, and injunctive relief, but it would necessarily mean that the District Court could find the Brotherhood guilty of a breach of its statutory duty to represent fairly without first determining whether the action of the Railroad, which Petitioners assert the Brotherhood should have prevented and protested, was a violation of the collective bargaining agreement. Such a conclusion by Petitioners clearly demonstrates that their objective here is to obtain a holding that a bargaining representative must process on behalf of Negro employees any grievance regardless of its merits. We have already stated our reasons why we do not believe the Railway Labor Act imposes such an obligation on the bargaining representative.

Finally, we respectfully submit that the holdings of the courts below are completely compatible with the conclusions of the United States Court of Appeals for the Ninth Circuit in *Hayes* v. *Union Pac. R. Co.*, 184 F. 2d 337, a decision on which the District Court below principally relied, and one in which this Court denied certiorari, 340 U. S. 942? In this case a group of Negro

employees alleged that the collective bargaining representative and the Railroad had violated the Railway Labor Act by administering a collective bargaining agreement so that the Negro employees were discriminatorily denied the promotions and seniority assignments to which they were entitled.[2] The Negro plaintiffs, as here, sought an injunction and other equitable relief, and the defendants moved to dismiss for lack of jurisdiction of the subject matter and failure to state a claim upon which relief may be granted. In affirming the judgment of the District Court granting defendants' motion to dismiss, the Court of Appeals stated the question raised by the appeal as being whether the District Court has jurisdiction under the Railway Labor Act of an employee's complaint charging racial discrimination in the performance of a collective bargaining agreement (p. 337). In answering this question in the negative, the Court said (p. 338):

> "It is not necessary to state in detail the nature of the affidavits and of the pleadings constituting the record which the trial court had before it. These matters are fully set forth in the opinion of Chief Judge Michael J. Roche, the trial judge. D. C., 88 F. Supp. 108. We adopt his opinion. We add to it only to the extent of saying that it is clear to us that the Federal Courts are not charged by federal law with the duty or function of policing the parties in the performance of collective bargaining agreements entered into pursuant to the Railway Labor Act. Congress did not, by the Railway Labor Act, grant jurisdiction to the Federal Courts to afford relief for breaches of performance of collective bargaining agreements. Appropriate tribunals have been established for that purpose. 45 U. S. C. A. § 153; National Railroad Adjustment Board; Slocum v. D. L. & W. R. Co., 339 U. S. 239, 70 S. Ct. 577. It is only when

[2] For the detailed facts see the District Court's opinion, 88 F. Supp. 108 at 109.

collective bargaining agreements are unlawfully entered into or when the agreements themselves are unlawful in terms or effect that federal courts may act. This is made quite clear by the Supreme Court in Steele v. L. & N. R. Co., 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173 and Tunstall v. Brotherhood, 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187. The disposition of the cause made by the District Court is correct."

In the *Hayes* case before the District Court, as in the instant case, the plaintiffs argued that their complaint charging deprivation of seniority rights solely because of race or color was not subject to determination by the Railroad Adjustment Board but was cognizable by the federal district court by virtue of this Court's holdings in the *Steele* and *Tunstall* cases. In response to this contention, Chief Judge Roche said in part (88 F. Supp. 108, 109-110):

"Respondents have filed certain motions to strike and have moved to dismiss the action on the grounds of (1) failure to state a cause of action upon which relief may be granted and (2) lack of jurisdiction of the Court over the subject matter. In resisting these motions the petitioners rely entirely on the decisions of the Supreme Court in Steele v. Louisville & N. R. Co., 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173, and Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187 . . . The fundamental question of jurisdiction thus depends on whether the record before this Court discloses a factual situation within the scope of the cited authorities. The Steele and Tunstall cases, supra, involved collective bargaining agreements that were discriminatory by their terms. There is no allegation in the present case that the collective bargaining agreement executed by Union and Railroad on June 1, 1942, and still in effect, discriminates against petitioners. They allege, instead, that discrimination has been effected by the

conduct of the respondents under the agreement, and contend that this is sufficient, under the Supreme Court decisions, to give this Court jurisdiction. The alleged discrimination arises in connection with respondent Railroad's seniority assignments and promotions.

* * *

"Turning now to the Steele and Tunstall cases, supra, upon which the petitioners ground their right of action, we find certain points of similarity and one of vital difference. In those cases the petitioners were Negro firemen employed by the respondent railroads, whose established practice was to promote only white firemen to engineers. The respondent Brotherhood, which excluded Negroes from its membership, was the authorized, exclusive bargaining representative of the craft of firemen employed by the railroads. The Brotherhood and the railroads entered into agreements restricting the seniority rights and the employment of Negro firemen, without giving them prior notice or opportunity to be heard.

* * *

"The Railway Labor Act is not a Fair Employment Practices Act. It imposes no duty upon the employer to act without discrimination, nor do the Steele and Tunstall cases, supra, so hold. . . . It is to be observed that while the facts of those cases were that the employer railroads practiced discrimination in the assignment and promotion of employees, and that the union Brotherhood practiced racial discrimination in its membership, the Supreme Court did not extend its ruling to include such practices in the prohibited area, but limited the rule to contracting and collective bargaining by the bargaining representative. Any doubt on this point was removed by the Supreme Court itself in Graham v. Brotherhood of Locomotive Firemen and Enginemen, 338 U. S. 232, 70 S. Ct. 14, 17, where the Court, referring to the Steele and Tunstall cases, supra, said: 'We held there that, as the exclusive statutory representative of the em-

tire craft under the Railway Labor Act, the Brotherhood could not bargain for the denial of equal employment and promotion opportunities to a part of the craft upon grounds of race.' "

Having thus disposed of the defendant railroad in the *Hayes* case, Chief Judge Roche then directed his attention to the allegations of the complaint that the bargaining representatives had violated its statutory duty of fair representation under the Railway Labor Act within the holdings of this court in the *Steele* and *Tunstall* cases. With respect to this contention, the court concluded (pp. 110-111):

"In the Steele and Tunstall cases, supra, the bargaining representative had made contracts which clearly violated this described duty. In the instant case neither the original complaint nor its amended forms contain any allegations that the respondent Union has violated this duty through collective bargaining or contracting. The sole allegation made against the Union is that it has acted 'in connivance' with the Railroad in the practices allegedly committed by the Railroad.

"An examination of the word 'connivance' shows its definition to be: 'corrupt or guilty assent to wrongdoing, not involving actual participation in it, but knowledge of, and failure to prevent or oppose it.' Webster's New International Dictionary; 'an agreement or consent, indirectly given, that something unlawful shall be done by another.' Bouvier's Law Dict., Rawle's Third Revision; 'Connivance with others may be committed by passive permission, or failure to prevent, of helping by not hindering when it is one's duty to prevent, or by negligence or voluntary oversight.' Brandon v. Holman, 4 Cir., 41 F. 2d 586, 588. This word cannot, without severe strain, be taken to mean 'participation through contracting.' Simply stated, the complaint alleges only that the Union has permitted, *through failure to prevent*,

> the existence of the alleged discriminatory practices of the Railroad." (Italics the Court's.)

We think the foregoing observations by Chief Judge Roche have particular application here since the most that can be said of Petitioners' allegation of wrongful conduct by Respondents is their "failure to prevent" the alleged discriminatory practices of the Railroad.

It is to be noted that this Court denied certiorari in the *Hayes* case (340 U. S. 942) although the petition for certiorari pointedly made the contention, advanced here by Petitioners, that the decision of the Ninth Circuit was in conflict with the decisions of this Court in the *Steele* and *Tunstall* cases.

The issue in the *Hayes* case and applicable law are thus almost identical to those in the instant case, with the single exception that in the *Hayes* case plaintiffs brought suit against the railroad as well as the bargaining representative and alleged that the Brotherhood had acted in connivance with the railroad in the discriminatory practices, which is not alleged here. Petitioners in the instant case seek in their brief to make much of the point that this is a dispute between Petitioners and their bargaining representative and does not involve or concern the Railroad. But the short answer to this contention is that obviously the basic and substantive nature of the cause of action cannot be so easily changed so as to vest the courts with jurisdiction through the simple tactic of omitting an indispensable party defendant. Moreover, the decisions of the district court and the Court of Appeals in the *Hayes* case pointedly bring out that there is a lack of jurisdiction in the courts as to either the Brotherhood or the Railroad to redress asserted unlawful application of a collective bargaining agreement.

CONCLUSION

For the foregoing reasons, Respondents contend that the District Court properly dismissed the Complaint either for failure to state a claim upon which relief may be granted against the Brotherhood or for lack of jurisdiction over the subject matter, and that the judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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